Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

MICHAEL K. DePAEPE, executor of the estate of Kenneth J. DePaepe,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALAN B. MORRISON
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20TH STREET, NW
WASHINGTON, DC 20009
(202) 588-1000

RICHARD M. GOODMAN
GREGORY S. PIERCE
GOODMAN, LISTER
& PETERS, P.C.
1394 E. JEFFERSON
DETROIT, MI 48207
(313) 567-6165

ANGELA J. NICITA
GRANZOTTO &
NICITA, P.C.
1500 BUHL BLDG
DETROIT, MI 48226
(313) 964-4720

Attorneys for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. Did the court of appeals err by concluding that the Department of Transportation regulation governing the energy absorbing capacity of sun visors in motor vehicles was a design standard, not a performance standard, thereby creating a conflict with every court that has considered the question, with the agency charged with administering the statute, and even with the automobile industry that is subject to the regulatory regime at issue?

2. When a trial court determines that any error that may have occurred was harmless, may a Court of Appeals review that determination under a de novo standard of review, rather than the abuse of discretion standard mandated by this Court and all other circuits?

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The April 9, 1998 opinion of the Seventh Circuit is reported at 141 F.3d 715 (7th Cir. 1998). The opinion is reproduced in the Appendix (App. A at 1a). A prior opinion of the Seventh Circuit, which is not relevant to this petition, is reported at 33 F.3d 737 (7th Cir. 1994). The Seventh Circuit's subsequent order denying rehearing and suggestion for rehearing en banc is not reported but is reproduced in the Appendix (App. E at 22a).

The August 27, 1996 judgment of the District Court for the Northern District of Illinois is not officially reported; it is reproduced in the Appendix (App. B at 11a). The October 10, 1996 opinion and order of the district court denying the motion for JNOV and new trial is not officially reported. The opinion is reproduced in the Appendix (App. C at 13a). The August 2, 1996 opinion and order of the district court excluding evidence of regulatory compliance or noncompliance is not officially reported but appears on Westlaw at 1996 WL 446903. (App. D at 15a.) The district court's opinion and order denying mistrial were rendered orally and are not reported; the transcript where they appear is reproduced in the Appendix (App. F at 23a).

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1998. (App. A at 1a.) Petitioner filed a timely petition for rehearing and suggestion for rehearing en banc which was denied on May 4, 1998. (App. E at 22a.) By order dated July 17, 1998, petitioner was granted an extension of time to file their petition for writ of certiorari until September 1, 1998. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES, REGULATIONS AND COURT RULES INVOLVED

15 U.S.C. §1391(2) provides:

> 'motor vehicle safety standards' means a minimum standard for motor vehicle performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

49 C.F.R. 571.201, §1 provides:

> Purpose and scope. This standard specifies requirements to provide impact protection for occupants.

49 C.F.R. 571.201, §3.4.1 provides:

> A sun visor that is constructed of or covered with energy-absorbing material shall be provided for each front outboard designated seating position.

Federal Rule of Civil Procedure 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is grounds for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.

> The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

PETITION FOR A WRIT OF CERTIORARI

This petition raises a vital issue concerning the means by which the Department of Transportation ("DOT") regulates motor vehicle safety. The case began as an ordinary product liability case, in which petitioner's decedent, Kenneth DePaepe, contended that respondent General Motors had unreasonably designed its sun visors by failing to include adequate padding to protect passengers in the event of a collision, relying in part on DOT's motor vehicle standard concerning the energy absorbing capacity of sun visors. About 7 days into the second trial, the district court decided that the standard was inadmissible because it was invalid. After several more weeks of trial, the jury returned a verdict in favor of petitioner's decedent, who died while the case was pending on appeal. Petitioner Michael DePaepe, as executor of his estate was substituted as plaintiff.[1]

The Court of Appeals for the Seventh Circuit concluded that the DOT regulation was not a performance standard and was, in fact deficient as a performance standard, but held that the regulation was still valid because it was a design standard. On this basis, the court held that the jury should have been told that GM complied with the standard as a matter of law, regardless of whether it provided any

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[1] For convenience the term "petitioner" will include both the decedent and his executor, who is the named party to the petition.

protection to vehicle occupants. It further decided that GM had been prejudiced by petitioner's introduction of evidence early in the trial suggesting that respondent failed to comply with the standard, despite the fact that the trial judge eventually struck the evidence and instructed the jury to disregard it.

The principal issue raised by this petition is whether the court of appeals correctly determined that the sun visor standard was valid as a design standard, despite its conclusion that the standard had no enforceable safety performance requirements. If the court is correct, every other court to consider whether motor vehicle safety standards issued by DOT must have performance requirements, as well as the DOT and the automotive industry, have been operating for more than 30 years under the mistaken premise that the DOT is permitted to issue *only* performance standards.

To understand both the importance of this question and the impact of the ruling in this case, we first review the relevant facts and proceedings below. In the course of that discussion, we will explain why this Court should also review the decision below because of its far-reaching implications for the process of appellate review and its disregard for the respective functions of trial and appellate courts in our federal system. Although this case came before the court of appeals subsequent to the trial court's denial of respondent's motion for new trial, including a determination that any error related to the admission or exclusion of evidence concerning regulatory compliance was harmless, the appellate court ignored the procedural posture of the case. Instead, it reviewed the 7 week trial record de novo, rather than under the deferential abuse of discretion standard mandated by the decisions of this Court and the other federal circuits. Had the court of appeals applied the appropriate standard for a

reviewing court, it could not have found an abuse of discretion here, and a costly third trial would have been avoided.

STATEMENT OF THE CASE

Factual and Procedural Background

Kenneth DePaepe, suffered a broken neck, leaving him a ventilator-dependent quadriplegic, after his 1984 Buick Regal was struck by another vehicle on August 15, 1984 in Downer's Grove, Illinois. The fracture occurred when Mr. DePaepe's head struck the passenger side sun visor in this low speed crash.

This product liability action was filed in 1986 by then Illinois resident Kenneth DePaepe against respondent GM, the manufacturer of the 1984 Buick Regal, in the United States District Court for the Northern District of Illinois, invoking jurisdiction based on diversity of citizenship under 28 U.S.C. §1332. Petitioner sued respondent on theories of negligence and strict liability. Among the defects alleged by petitioner was that the sun visor in the 1984 Buick was not reasonably designed to prevent foreseeable injuries to occupants in crashes.

The first trial of this action took place over a 3-week period in 1992 and resulted in a verdict in favor of respondent GM. Petitioner appealed to the Seventh Circuit raising two issues under Illinois law: (1) whether the court erred in instructing the jury on the concept of "enhanced injury" where it was undisputed that the plaintiff suffered a single, indivisible harm; and (2) whether the court should have excluded evidence that the vehicle had a functional restraint system. *DePaepe v. General Motors Corporation*,

33 F.3d 737 (7th Cir. 1994). The Court of Appeals reversed and remanded for a new trial because it concluded that the instructions on enhanced injury were erroneous and "permitted the jury to return a verdict for General Motors on an improper ground." *Id.*, at 747.

The second trial occurred in 1996 and took seven weeks. The parties were in agreement that Kenneth DePaepe's neck broke when his head was caught on the sun visor. Petitioner presented his claim to the jury on two theories: (1) the sun visor was not sufficiently energy absorbing to offer reasonable protection to occupants who would foreseeably hit the visor in collisions, and (2) the sun visor was not recessed or secured in a manner to prevent entrapment of the head and to allow it to reach the energy absorbing windshield in foreseeable crashes. With respect to the theory that the visor was not reasonably energy-absorbing, petitioner sought to show that it did not comply with Federal Motor Vehicle Safety Standard 201, §3.4.1 regarding sun visors.[2]

The District Court's Rulings Regarding Evidence of Regulatory Compliance

Federal Motor Vehicle Safety Standard (FMVSS) 201 concerns "Occupant Protection in Interior Impact". Section 1 sets forth the "purpose and scope" of the regulation: "This

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[2] Under Illinois law, violation of, or compliance with, a safety regulation is admissible as evidence, to be considered with all other evidence, on the question of whether a product design is reasonably safe, or whether the defendant manufacturer was negligent. *Malek III v. Lederle Laboratories*, 125 Ill. App. 3d 870, 872; 466 N.E. 2d 1038, 1040 (Ill. App. 1984).

standard specifies requirements to afford impact protection for occupants." 49 C.F.R. 571.201, §1. Section 3.4.1, the subsection regarding sun visors, states that sun visors must be "constructed or covered with energy-absorbing material." 49 C.F.R. §571.201, §3.4.1.[3]

Prior to trial, respondent filed a motion in limine asking the court to preclude petitioner from introducing evidence or arguing to the jury that respondent had failed to comply with the sun visor standard and further requesting an instruction that respondent had complied with it. It was respondent's position that, as long as the visor was covered with or constructed of *any* energy-absorbing material, it met the standard as a matter of law, regardless of the quantity of energy the material could absorb and regardless of whether it was sufficiently energy-absorbing to serve any occupant protection function.

Petitioner, on the other hand, maintained that the regulation had to be read in the context of its stated purpose and the requirements of the enabling legislation, the Motor Vehicle Safety Act, 15 U.S.C. §1381, *et seq.*, *recodified at* 49 U.S.C. §30101, *et seq.*[4] Accordingly, petitioner contended that the standard required that the visor be

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[3] The standard is now FMVSS 201, §5.4.1 and is found at 49 C.F.R §571.201, §5.4.1. The language remains identical.

[4] Throughout this Petition, petitioner refers to the sections of the Motor Vehicle Safety Act, as it was in effect during the relevant time period, 15 U.S.C. §§1381-1431. That statute was repealed effective June 5, 1994. Although the revised statute that replaces it, 49 U.S.C. §§30101-30169 does not vary in substance from the repealed legislation, petitioner will provide footnote citations to the corresponding revised statutory provisions.

constructed or covered with energy-absorbing material that was sufficient to provide reasonable occupant protection in the event of a crash, and that fabric backed by 1/16" of urethane did not comply with this standard because it did not provide reasonable protection.

Initially, the district court accepted petitioner's construction of the standard and denied respondent's motion in limine. The court held that it would allow the parties to present evidence on whether the visor complied with the standard, and that at the appropriate time it would instruct the jury as to the meaning of the standard – i.e., that the standard required respondent to cover the visor with, or construct the visor of energy-absorbing material that was reasonably sufficient to provide occupant protection in a crash. The question of whether the visor complied with the standard would be for the jury.

During his case in chief, petitioner presented no direct evidence that the visor violated FMVSS 201, §3.4.1, but did present a plethora of evidence that the sun visor was not reasonably energy-absorbing.[5] His presentation included industry documents from the 1950's through the early 1970's, including ones authored by respondent, which recognized that the use of padding to increase the energy-absorbing capability of sun visors was an effective means of guarding occupants against injuries. Petitioner demonstrated that, despite this recognition of energy-absorbing padding as a safety feature, respondent actually *removed* almost all padding from its visors

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[5] He did present the deposition testimony of some of respondent's employees, including the employee who certified compliance with FMVSS 201, stating their opinions that the visor did comply with §3.4.1.

by 1980.

Petitioner also presented expert testimony from Steven Syson (an automotive design engineer formerly employed by respondent) analyzing accident data covering many thousands of sun visor injuries, which showed that they increased in severity after respondent eliminated visor padding. Mr. Syson also conducted a series of laboratory and physical tests. The results of those tests consistently established that the 1984 Buick Regal sun visor was significantly less energy-absorbing than the prior padded design, and that it performed worst in terms of energy-absorbing capacity when compared with a variety of other visors. Additional comparative data demonstrated that only a sun visor with as little padding as the 1984 Buck Regal would result in sufficient energy being delivered to the head and neck of an occupant to cause a fracture under the conditions of the subject crash. Petitioner's biomechanical expert, Dr. Carley Ward, confirmed that if Kenneth DePaepe had struck a less rigid visor, he would have sustained little or no injury.

At the court's request, petitioner's counsel notified the court when he was about to ask Mr. Syson about compliance with the standard. A short recess was taken, and before recalling the jury, the court handed the parties its opinion and order holding, sua sponte, that the standard was invalid because it did not meet the requisite regulatory criteria set forth in the Motor Vehicle Safety Act. (App. D at 20a.) The court not only struck all evidence regarding the standard, but also precluded the parties from making any argument regarding compliance or noncompliance with the standard. (*Id.*) It further stated that the jury would receive "an appropriate instruction" telling it to "disregard §3.4.1 and any evidence relating to compliance or noncompliance with it" (*Id.*), and in fact, the jury was instructed three times to

"disregard . . . all prior testimony and other evidence which relates solely to section 3.4.1, and all evidence relating solely to compliance or noncompliance with Section 3.4.1". (App. G at 26a-29a.)

At the time the court struck the regulatory compliance issue from the case, respondent initially agreed with the decision and stated that a curative instruction would be appropriate. However, the following day, respondent moved for a mistrial. The trial court denied the motion based on an express finding that neither party had been prejudiced by the substance or timing of its decision to exclude the issue of regulatory compliance from the case. (App. F at 23a-24a.) It further concluded:

> The Court is convinced that a cautionary instruction at this time coupled with the opportunity the parties will have during the balance of the case and during closing arguments to present evidence and argument on the issues the jury will be deciding, and a repetition of the cautionary language in the jury instructions, will suffice to properly guide the jury as to what it is not to consider.
>
> And the Court is further convinced that the jury will follow the Court's instructions in this regard.

(App. F at 24a.)

Although FMVSS 201, §3.4.1 was never mentioned again before the jury by either party, the trial court's exclusion of the standard from the case did not prevent either party from introducing evidence regarding whether the visor

was reasonably energy-absorbing; it only precluded reference to the regulatory standard dealing with energy-absorbing capacity. However, respondent chose not to introduce any evidence whatsoever defending the energy-absorbing character of the visor. Instead, respondent confined its defense to the issue of causation. Respondent took the position, from opening argument forward, that the energy-absorbing capacity of the sun visor was irrelevant -- that no matter how much padding the visor had, it could not have prevented Kenneth DePaepe's injury.

After instructions, which again directed the jurors to disregard all evidence related to FMVSS 201, §3.4.1, the jury rendered a verdict in favor of petitioner and awarded compensatory damages in the amount of $12,617,600.00. The question of punitive damages was tried separately, and the jury found no basis for such an award.

Respondent filed a motion for judgment notwithstanding the verdict and for a new trial. In support of its motion for new trial, respondent raised the same issue which later formed the main ground for its appeal -- that the trial court had erred when it excluded the standard on the ground that it was invalid, and that the trial court should have instead granted its motion in limine and instructed the jury that respondent had complied with the standard as a matter of law. The trial court denied post-trial relief. With respect to the motion for new trial, the court (incorporating its earlier ruling on the motion for mistrial) again held that there had been no prejudice to either party from its decision to exclude the standard in light of the curative instructions given to the jury. (App. C at 13a.)

Proceedings in the Court of Appeals

Respondent appealed to the Seventh Circuit, seeking a remand for a new trial. It alleged three evidentiary errors: (1) the trial court should have granted its motion in limine and instructed the jury that respondent had complied with the standard; (2) the trial court should not have precluded respondent from introducing petitioner's prior pleadings and interrogatory answers discussing alternative theories of defect, and (3) the lower court should not have allowed petitioner's expert, Steven Syson, to testify regarding tests he performed or respondent's rationale for removing padding from its visors.

Per Seventh Circuit Internal Operating Procedure 6(b), the case was assigned to the panel that had decided the first appeal in this case: Judges Rovner (the author of the first opinion), Manion, and Kanne. The morning of oral argument, January 7, 1998, when the argument schedule was posted, Judges Rovner, Manion, and Kanne were scheduled to hear all of the arguments on the calendar that day, except this case, which alone was to be heard by Judges *Easterbrook*, Manion, and Kanne. Upon inquiry to the clerk's office, petitioner was informed that Judge Rovner had recused for unknown reasons the prior afternoon.

The Seventh Circuit issued its opinion in this case, authored by Judge Easterbrook, on April 9, 1998. The court reversed and granted a third trial based on the trial court's handling of the regulatory compliance issue.

It held that the trial court erred in excluding the regulation on grounds that it was invalid. In so holding, the court declared that motor vehicle safety standards come in "two flavors": design and performance. (App. A at 3a.) The

court determined that FMVSS 201, §3.4.1 is not a performance standard, and would be "deficient" as such because it fails to specify the amount of energy the visor or its covering must absorb. (App. A at 4a.) Despite this "deficiency" however, the appellate court construed FMVSS 201 to be valid as a "design" standard, without ever examining the requirements of the Motor Vehicle Safety Act. (App. A at 3a-4a.)

Based on its construction of the sun visor regulation as a valid design standard, the court found two errors which, in its view, required reversal. First, it concluded that respondent should have been able to tell the jury that it complied with the standard as a matter of law. (App. A at 4a-5a.) The court reasoned that since the standard was a design standard and did not set forth any safety performance criteria, the fact that respondent had covered its visor with a material that did "dissipate" some energy (even though "there was not very much foam, so not very much energy was absorbed") meant respondent satisfied the standard as a matter of law. (App. A at 3a-4a.)

Second, because §3.4.1 is a design standard, the court determined that the petitioner should not have been allowed to introduce evidence that implied that the standard was violated. Although that evidence was stricken from the record, the court found this was still prejudicial error. (App. A at 4a-5a.) The opinion does not even mention, however, that respondent moved for a new trial on these same grounds in the trial court, and that the motion was denied, in part, because the trial court concluded that any error was harmless.[6]

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[6] The court rejected respondent's other claims of error, except for its allegation that the trial court should not have allowed

Rather than reviewing the trial court's harmless error decision under an abuse of discretion standard, the court of appeals engaged in its own de novo determination. The court found that respondent was prejudiced by its inability to demonstrate that it complied with the standard. (App. A at 5a.) In making that finding, however, it ignored its own legal conclusions that the standard was not related to the safety performance of the visor, and was a "bite size" regulation which accomplished very little. (App. A at 4a.)

Petitioner's timely petition for rehearing and suggestion for rehearing en banc were denied on May 4, 1998.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's holding that Federal Motor Vehicle Safety Standards can be valid as design standards, without performance requirements, is contrary to the express language of the enabling legislation, the legislative history of that statute, both the Department of Transportation and the auto industry's view of the DOT's rulemaking authority, and the opinions of all of the courts of appeals that have addressed the issue.

The first question presents a vitally important issue

Steven Syson to offer an opinion on respondent's motive for removing the padding from its visors. (App. A at 9a.) The court, however, did not cite this limited error as part of its basis for granting a new trial.

relating to the kind of motor vehicle safety standards that the DOT is permitted to issue under its governing statute. Until this case, everyone to have considered the issue since the law was passed in 1966 -- from courts to administrative officials to the auto industry itself -- has universally concluded that the Motor Vehicle Safety Act mandates that all automotive safety standards must be written as *performance*, not *design* standards. Unless the lower court's decision is reversed, the status of the many hundreds of DOT standards will be in doubt. Such doubt will infect not only products liability actions such as this one, but it will also affect DOT's authority to enforce many of its existing motor vehicle safety standards and its ability to enact meaningful new ones.

The Motor Vehicle Safety Act ("MVSA") was enacted in response to the "soaring rate of death and debilitation on the Nation's highways." S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), reprinted in 1966 U.S. Code Cong. & Admin. News 2709, 2709. Congress sought to improve automotive safety by authorizing the promulgation of mandatory "federal motor vehicle safety standards" ("FMVSS") which would apply to all new motor vehicles. One of the areas the standards were particularly intended to address was vehicle "crashworthiness". The main focus of congressional attention was on the dangers presented by the "second collision" -- the often catastrophic impact between a vehicle's occupants and the vehicle's interior. Senate Report, 1966 U.S. Code Cong. & Admin. News at 2710-2712.

In its definition of a "federal motor vehicle safety standard" the MVSA expresses the clear congressional intent that each standard is to be "a minimum standard for motor vehicle *performance*, or motor vehicle equipment

performance." 15 U.S.C. §1391(2) (emphasis added).[7] Congress made a conscious choice to require the enactment of performance standards, as opposed to design standards, because it concluded that the goal of automotive safety could be best realized in our free market economy by encouraging competition between manufacturers to devise the most effective means of achieving objective performance goals, rather than establishing mandatory design specifications which would stifle innovation and competition by imposing uniformity in vehicle styling. H.R. Rep. No. 1919, 89th Cong. 2d Sess. (1966), reprinted in 1966 U.S. Code Cong. & Admin. News 2732; Senate Report, 1966 U.S. Code Cong. & Admin. News at 2713-2714.

Petitioner offered the court of appeals a construction of FMVSS 201, §3.4.1 which was consistent with settled rules of regulatory construction and which furthered the purposes of the MVSA. He urged the court to read the regulation as a valid performance standard which required that sun visors be constructed or covered with material that was sufficiently energy-absorbing to provide an objectively reasonable level of occupant protection.[8] This was the construction that the

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[7] Now 49 U.S.C. §30102(a)(9).

[8] The construction of §3.4.1 advocated by petitioner was consistent with the Illinois common law standard for determining whether a product is defective; i.e. whether the visor was "*unreasonably* dangerous." *Korando v. Uniroyal Goodrich Tire Co*, 159 Ill. 2d 335, 343; 637 N.E. 2d 1020, 1024 (Ill. 1984). As the trial court specifically found when it denied respondent's motion for mistrial, this common law standard allowed both sides the full opportunity to present evidence on whether the visor was reasonably energy-absorbing, even after the regulation was excluded. (App. F at 24a.)

district court originally adopted when it denied respondent's motion in limine. It was the appropriate construction because it was consistent with the statute's specification that standards must regulate performance, and it did not undercut regulatory goals by branding a federal safety standard as meaningless. The Seventh Circuit's construction of the standard at issue in this case, however, does not even mention the controlling provisions of the MVSA or its legislative history.

Instead, the sole support cited by the court for its construction of the regulation was three calendar entries from the DOT's regulatory agenda for 1995 and 1996, none of which stated that 3.4.1 was a design standard. (App. A at 3a.) Moreover, these calendar entries represent DOT plans for *possible* regulatory action; they are not final rules issued after notice and comment, nor do they represent DOT's construction of any regulatory provision.

By contrast, in DOT publications that do represent official agency statements regarding the nature of FMVSS 201, §3.4.1 (and which were cited to the Seventh Circuit in petitioner's opening brief), the agency took the position that §3.4.1 was a "performance" standard. For example, in its January 28, 1988 "Evaluation Report concerning Safety Standard No. 201", DOT characterized that standard as regulating "the *performance* of certain vehicle interior surfaces in a crash, specifying impact test, or requiring padding for instrument panels, seat backs, *sun visors*, armrests and glove compartment doors." 53 Fed. Reg. 2,516 (1988) (emphasis added). Similarly, in 1982, at a time contemporaneous with the design and manufacture of the vehicle involved in this case, the DOT stated in a "Notice of proposed rulemaking": "In addition to the requirements for seat backs, Standard No. 201 sets *performance* requirements for instrument panels, interior compartment doors, *sun visors*

and arm rests to prevent or reduce injuries to persons thrown against them in crashes." 47 Fed. Reg. 25,170 (1982) (emphasis added).

The Seventh Circuit's conclusion that the DOT can issue design standards is contrary to the views of every other circuit to address this aspect of motor vehicle safety regulation. These courts, after reviewing the express language of the statute and its history, have uniformly held that the DOT is "generally charged with developing performance standards, not design specifications". *Washington v. Dep't of Transportation*, 84 F.3d 1222, 1224 (10th Cir. 1996), *Wood v. General Motors Corp.*, 865 F.2d 395, 416-17 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), *Chrysler Corp. v. Dep't of Transportation*, 515 F.2d 1053, 1057-58 (6th Cir. 1975), *Chrysler Corp. v. Dep't of Transportation*, 472 F.2d 659, 678 (6th Cir. 1972). Although these courts have recognized that performance standards may have design aspects (such as a standard that requires a vehicle to have certain enumerated items of equipment, but then states that those enumerated items of equipment are subject to specific performance criteria), no court, prior to the instant decision, has ever declared that the DOT has authority to issue design standards even if they contain no safety performance requirements.

The Seventh Circuit's construction of FMVSS 201, §3.4.1 is also at odds with the DOT's interpretation of its own regulatory authority. The DOT has repeatedly expressed its view that the "Motor Vehicle Safety Act defines the term 'motor vehicle safety standard' in terms of performance, not design specifications." 48 Fed. Reg. 1992 (1983); *see also*, 63 Fed. Reg. 8,518 (1998), 49 Fed. Reg. 29,001 (1984). The court's construction of the DOT's regulatory authority in this case invites that agency to enter into the car design

business, a governmental role that Congress expressly eschewed when it enacted the MVSA. At the very least, the Seventh Circuit should have asked for the views of the DOT, as the regulatory agency charged with the primary responsibility for enforcement of the MVSA, before adopting such a radical, aberrant position.

Finally, in precise contradiction to respondent's position in this case, the automotive industry itself has always argued vehemently that the DOT lacks the statutory authority to create design standards. *See e.g.*, *Chrysler Corp.*, 515 F2d at 1057; *Wood*, *supra;* 49 Fed. Reg. 28,973 (1984)(Motor Vehicle Manufacturers Association "argued that adopting an automatic restraint requirement that specified the installation of a specific type of restraint, i.e., airbags, would violate the requirement of the Safety Act that safety standards be stated in terms of performance instead of design."), 49 Fed. Reg. 28, 974 (1984) ("Toyota restated its general opposition to mandated automatic restraints and its specific opposition to a design (airbag) standard rather than a performance standard."), 49 Fed. Reg. 29,008 (1984) ("Ford argues that automatic belts are not feasible in convertibles and that the only means of compliance would be with airbags, thus resulting in a 'design' standard for these vehicles."), 63 Fed. Reg. 8,518 (1998)(Discussing FMVSS re: vehicle headlamps: "This resulted in numerous burdensome petitions for rule making to be submitted by the vehicle and [headlamp] manufacturers to change the design restrictive language. The reason for this burden was that as originally adopted the standard was more equipment design oriented, rather than performance oriented. Recent amendments have helped rectify this situation".) In fact, in its "Initial Responses to FMVSS 201", the very standard at issue here, General Motors took a firm stance that "design requirements ... are improper. *** A standard should impose performance requirements

only."[9]

The decision below will also have a major impact on the construction and enforceability of motor vehicle safety standards. The court's interpretation of the standard means that a sun visor that is constructed or covered with *any* energy absorbing material complies with the standard, regardless of the safety performance of the chosen material or impact protection provided. Because (as the lower court recognized and as GM conceded) "all materials are energy-absorbing to a greater or lesser degree"[10], the standard as construed by the Seventh Circuit is meaningless; as long as a manufacturer equips a vehicle with sun visors, the vehicle is in compliance with the standard. Under the Seventh Circuit's construction, the standard has no more relationship to safety than a regulation requiring all visors to be red.

By placing its stamp of approval on a construction that nullifies the standard, the Seventh Circuit's opinion precludes any enforcement of §3.4.1 by the DOT. It also opens the door for the auto industry to assert that other general standards, like §3.4.1, which do not specify precise quantification criteria, are "design" standards, and thus, do not require even a minimum, reasonable level of safety performance to achieve compliance.[11]

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[9] NHTSA Docket No. 207 p. 90042, Statement prepared on behalf of General Motors Corporation by George R. Ryder, Assistant Chief Engineer, Buick Motor Division, General Motors Corporation, dated May 10, 1967.

[10] See, App. D at 18a.

[11] *See, e.g.*: FMVSS 201, §5.5.2 for folding armrests which specifies one method of compliance is for the armrests to

Such a result is also inconsistent with the comprehensive system for regulation of motor vehicle safety established under the MVSA. An important link in this system is the manufacturer's certification to the purchasing public, through dealers, that each vehicle complies with the all federally mandated safety standards. 15 U.S.C. §§1397(a)(1)(C), (E); 1403.[12] The MVSA thus serves to assure motorists that each vehicle meets the government's criteria for vehicle safety. Indeed, the Act requires notification to owners and recall or repair of a vehicle that violates any safety standard because such a violation can endanger vehicle occupants. 15 U.S.C. §§1397(a)(1)(D); 1412(a), 1413(a).[13] The Seventh Circuit's holding that a manufacturer can certify compliance with a standard, even if the manufacturer has not achieved a minimally reasonable level of safety performance, turns the certification process into a sham - - certification that a vehicle component meets an applicable "safety" standard need have nothing to do with safety.

The final and perhaps most basic indictment of the Seventh Circuit's opinion is that it strikes at the very heart of the statute by actually voiding the "performance" aspect of the statutory definition of "federal motor vehicle safety standard".

"[b]e constructed of or covered with energy-absorbing material"; FMVSS 209, §4.1(c) for upper torso restraints provides that they "shall be designed to minimize vertical forces on the shoulders and spine."; FMVSS 209, §4.1(e) regarding seatbelt buckle release provides that the "[b]uckle release mechanism shall be designed to minimize the possibility of accidental releases."

[12] Now 49 U.S.C. §30115.

[13] Now 49 U.S.C. §§30118(a), 30119(a).

See, 15 U.S.C. §1391(2). The court's decision that the DOT can issue a motor vehicle safety standard that has no performance requirement contravenes the express congressional mandate that the DOT must regulate through performance standards.

In sum, the Seventh Circuit's construction of FMVSS 201, §3.4.1 as a design standard with no safety performance requirements flies in the face of every authority that has touched on the question. Not only have Congress and three federal circuits declared that FMVSS must primarily address performance, but the DOT and the auto industry also agree that promulgation of design standards falls outside statutorily-defined regulatory authority.

II. The court of appeals' reversal of the district court's denial of the motion for new trial constitutes an unprecedented departure from the appropriate role of an appellate court, and is contrary to the established law of all of the federal circuits and of this Court.

Even if the Seventh Circuit's construction of the DOT's authority in promulgating safety standards was correct, its decision to order a new trial plainly exceeded the established function of an appellate court in situations such as this. The three members of the panel treated this appeal as if they were trial judges who sat through the entire case, heard the evidence and instructions, and observed the jurors' reactions to that evidence and those instructions. In so doing, the appellate court ignored the findings of the trial judge who actually made those first-hand observations.

The Seventh Circuit placed itself in this inappropriate

role by disregarding this Court's recent reminder (albeit in a different context) of one of the most basic principles regarding the respective roles of appellate and district courts in the federal system: Where the district court has ruled on the need for a new trial, an appellate court may only reverse that court's decision upon a finding of abuse of discretion. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996). This fundamental rule defining the review function of an appellate court is well-settled by opinions of this Court[14] and in all of the federal circuits.[15]

In this case, however, the Seventh Circuit avoided application of this established standard of review by disregarding critical procedural facts. The opinion *does not even mention the fact that this appeal was taken subsequent to the trial court's denial of respondent's motion for new trial,*

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[14] *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984), *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

[15] *Codex Corp. v. Milgo Electronic Corp.*, 717 F.2d 622, 632 (1st Cir. 1983), *cert. denied*, 466 U.S. 931 (1984); *Bevevino v. Saydjari*, 574 F.2d 676, 678 (2nd Cir. 1978); *Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002, 1017 (3rd Cir. 1995); *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 165 (4th Cir. 1988); *Pryor v. Trane Co.*, 138 F.3d 1024, 1026 (5th Cir. 1998); *Monette v. AM-7-7 Baking Co., Ltd.*, 929 F.2d 276, 280 (6th Cir. 1991); *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396 (8th Cir. 1994); *In re Hawaii Federal Asbestos Cases*, 871 F.2d 891, 896 (9th Cir. 1989); *Scholz Homes, Inc. v. Wallace*, 590 F.2d 860, 864 (10th Cir. 1979); *Hessen for the Use and Benefit of Allstate Ins. Co. v. Jaguar Cars, Inc.*, 915 F.2d 641, 644 (11th Cir. 1990), *Grogan v. General Maintenance Service Co.*, 763 F.2d 444, 447 (D.C. Cir. 1985).

which raised the same allegations of error that were raised on appeal. Nor does the opinion mention that the district court (both in denying respondent's motion for mistrial and then again in the context of denying a new trial) made specific findings that respondent did not suffer any prejudice as a result of the court's mid-trial decision to exclude the issue of regulatory compliance from the trial and provide a curative instruction to the jury. The court of appeals apparently believed itself free to ignore the district court's findings regarding lack of prejudice and to determine the question of whether a new trial should be granted on a *de novo* basis -- as though these findings were never made. Thus, it is not surprising that in granting a new trial the court also never mentions abuse of discretion.

The appeals court ordered a new trial on two grounds. First, it held that the jury improperly heard evidence suggesting that respondent violated Section 3.4.1. Second, it stated that the district court should have told the jury that respondent complied with the regulation as a matter of law. Had it applied the proper standard of review, it could not have directed that a new trial take place.

With respect to the first ground, the district court provided a curative instruction to the jury to disregard all evidence relating to the standard or whether respondent complied with it -- twice during the testimony of petitioner's expert (just after it made its ruling striking the evidence), and again during final instructions to the jury. There was never any finding by the Seventh Circuit that this instruction was insufficient to cure any potential prejudice to respondent. In fact, the appellate court *did not even acknowledge that a curative instruction was given,* thereby avoiding application of another well-accepted tenet of appellate review - - that an appellate court must "presume that the jury will follow an

instruction to disregard inadmissible evidence unless there is an overwhelming probability that the jury will be unable to follow the court's instructions and strong likelihood that the effect of the evidence would be devastating." *Raybestos Products v. Younger*, 54 F.3d 1234, 1239 (7th Cir. 1995); *Holmes v. City of Massillion, Ohio*, 78 F.3d 1041, 1046-47 (6th Cir.) *cert. denied*, 117 S. Ct. 312 (1996).

As to the second ground, respondent had the full and unfettered opportunity to present whatever evidence it wished to demonstrate that the visor was reasonably energy absorbing (other than evidence that specifically referred to the standard), but it chose not to do so. Instead, it took the position that "energy-absorbing had nothing to do with this case" -- that no matter how energy absorbent it was, no sun visor could have prevented Kenneth DePaepe's broken neck. Given this defense strategy (a fact which the appellate court's opinion again avoids), the failure to allow respondent to tell the jury that it complied with a regulation specifying that the visor must be constructed or covered with energy-absorbing material could not have affected its substantial rights, and thus could not be a basis for granting a new trial. Fed. R. Civ. P. 61.

This unprecedented refusal by the Seventh Circuit to recognize its appropriate function regarding denial of a new trial jeopardizes the strong policies limiting appellate review to application of the abuse of discretion standard. The trial judge is in a unique position to determine the effect a particular error may have had upon the outcome of a trial. *U.S. v. Bruscino*, 687 F.2d 938, 941 (7th Cir. 1982) (en banc) (Posner, J.), *Anheuser-Bush, Inc. v. National Beverage Distributors*, 69 F.3d 337, 346 (9th Cir. 1995). Thus, it is the trial judge, initially, who must utilize those first-hand observations to make the "harmless error" assessment when

a litigant files a motion for a new trial. *See*, Fed. R. Civ. P. 61, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 553 (1984).

The role of the appellate court, on the other hand, reflects its position as a court of review, examining the case on the cold, printed record. *See Gasperini, supra* at 438; *U.S. v. McBride*, 862 F.2d 1316, 1320 (8th Cir. 1988). It is the difference in the abilities of these courts to evaluate prejudice to the moving party which led to the development of the abuse of discretion standard.

> The trial judge will always be in a better position than the appellate judges to assess the probable reaction of jurors in a case over which he has presided. He has the opportunity to observe the jurors' demeanor and gauge their attentiveness, as the appellate judges have not. He can also judge, as we cannot, whether the atmosphere of the trial, that congeries of intangibles that no stenographic transcript can convey - might have made the jury receptive to being prejudiced by the documents in question, or, for that matter, might have inoculated it against such prejudice. As we cannot put ourselves in the district judge's shoes in these matters we ought to accept his judgment unless we have a very strong conviction of error.

Bruscino, supra at 941, *See also, U.S. v. O'Keefe*, 128 F.3d 885, 873 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1525 (1998); *Harris v. Zurich Ins. Co.*, 527 F.2d 528, 531 (8th Cir. 1975).

Here, the trial judge made a reasoned determination

that between the curative instruction he provided, and the parties' full opportunity to present argument and evidence on the issue of the energy-absorbency of the visor outside the context of regulatory compliance, any possible error was harmless. He found that the jury decided this case fairly, without any undue prejudice to the respondent. (App. F at 23a-24a; App. C at 13a.) *See*, *Sprankle V. Bower Ammonia v. Bower Ammonia & Chemical Co.*, 824 F.2d 409, 417 (5th Cir. 1987). Accordingly, the only job left to the court of appeals was to decide whether the district court abused its discretion in making that determination. *See*, *U.S. v. Johnson*, 327 U.S. 106, 113 (1946); *U.S. v. Bruscino*, *supra*. Had the court restricted itself to this inquiry, it could not have found an abuse of discretion.

In this case, the costs of the court of appeals' refusal to recognize and apply the correct standard of review are staggering. The two previous trials in this case alone have already consumed 10 weeks of the district judge's time and the time of his staff, 10 weeks of attorney time and juror time, as well as the time committed by the various witnesses. Add to this the tremendous expense to both parties for expert testimony, accident reconstruction, production of evidence, and all of the other myriad expenses of litigation. Yet a third lengthy trial will be needed unless this Court reviews the Seventh Circuit's refusal to give proper deference to the district court's well-reasoned determination that, in the context of this often complex 7 week trial, the evidentiary error alleged by respondent did not affect the substantial rights of either.

As this Court recognized in *McDonough Power Equipment, Inc.*, it was because of these burdensome costs of litigation that the harmless error rule, Fed. R. Civ. P. 61, was written to encompass trial court determinations of new trial

motions. *Supra*, at 553. If an appellate court can, as it did in this case, ignore the trial court's findings regarding lack of prejudice and make its own findings on a *de novo* basis, the function of the harmless error rule, and the standard of review in fostering the orderly administration of justice and avoiding such expensive relitigation, will be undermined.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/_____
Alan B. Morrison
(Counsel of Record)
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Richard M. Goodman
Gregory S. Pierce
Goodman, Lister & Peters, P.C.
1394 East Jefferson
Detroit, Michigan 48207
(313) 567-6165

Angela J. Nicita
Granzotto & Nicita, P.C.
1500 Buhl Building
Detroit, Michigan 48226
(313) 964-4720

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3886

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 88 C 10817 — George W. Lindberg, *Judge*.

ARGUED JANUARY 7, 1996 — DECIDED
APRIL 9, 1998

MICHAEL K. DEPAEPE, executor)
of the estate of Kenneth J. DePaepe)
Plaintiff-Appellee,)
)
v.)
)
GENERAL MOTORS)
CORPORATION,)
Defendant-Appellant.)

Before EASTERBROOK, MANION, and KANNE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. An automobile accident in 1984 left Kenneth DePaepe a quadriplegic; his neck broke during the deceleration. DePaepe says that a better design of the auto's sun visor would have averted the

loss; General Motors contends that the car (a 1984 Buick Regal) was crashworthy and that only DePaepe's failure to use his seatbelt accounts for the injury. This tort suit under the diversity jurisdiction has been tried twice. After a three-week trial, the first jury absolved GM, but we reversed because the judge should not have instructed the jury about the concept of enhanced injury. 33 F.3d 737 (1994). After a seven-week trial, the second jury found in DePaepe's favor and awarded $12.6 million in damages. DePaepe died while the case was on appeal; the litigation has been carried on by the executor of his estate. We must, alas, reverse a second time.

DePaepe's lawyer told the jury during his opening statement that the visor was defective because it did not comply with a federal motor vehicle safety standard requiring sun visors for the front seats to be "constructed of or covered with energy-absorbing material". 49 C.F.R. §571.201 S3.4.1 ("FMVSS 201 s3.4.1"). For 7 trial days (during 13 calendar days) the jury heard evidence designed to persuade it that GM violated this regulation. Counsel sought to convince the jury (i) that "energy-absorbing" means "absorbing a lot of energy" rather than "absorbing some energy", and (ii) that the visor did not dissipate the requisite amount of energy and thus exposed DePaepe's neck to too much force. GM contested step one of that argument by a motion in limine, reminding the judge that the meaning of a regulation is a question for the court, not the jury. *See Bammerlin v. Navistar International Transportation Corp.*, 30 F.3d 898, 900 (7th Cir. 1994); *Tyus v. Urban Search Management*, 102 F.3d 256, 266 (7th Cir. 1996). Yet instead of telling the jury what FMVSS 201 s3.4.1 means, the district judge first allowed DePaepe to argue his interpretation of the regulation to the jury for two

weeks and then stunned everyone by declaring FMVSS 201 s3.4.1 invalid and forbidding either side to mention it again in the jury's presence. Both sides were flummoxed: DePaepe wanted to use FMVSS 201 s3.4.1 to bolster his case, while GM wanted to answer DePaepe's presentation (in lieu of which it wanted a mistrial) and to argue on its own behalf that the visor's compliance with FMVSS 201 s3.4.1 is a reason to conclude that the design was not defective.

Motor vehicle safety standards come in two flavors: design and performance. Design standards specify what a component of a vehicle must be; performance standards specify what the component must accomplish. A requirement that every car have safety belts is a design standard, a requirement that each anchorage of each safety belt withstand a 5,000 pound force (see FMVSS 210 s4.2.1) is a performance standard. FMVSS 201 s3.4.1 is written as a design standard:

> A sun visor that is constructed of or covered with energy-absorbing material shall be provided for each front outboard designated seating position.

The National Highway Transportation Safety Administration, which issued FMVSS 201 s3.4.1, has confirmed that this regulation creates a design standard. 60 Fed.Reg. 60,404 (1995); 61 Fed. Reg. 23,413,62,934 (1996). GM covered the sun visors in 1984 Buick Regal cars with nylon backed by polyurethane foam. No one doubts that polyurethane foam dissipates energy when compressed. It is therefore an "energy-absorbing material". There was not very much foam, and so not very much energy was absorbed. The

parties debate the prudence of GM's engineering decision. But as a design standard FMVSS 201 s3.4.1 is straightforward— and it was satisfied as a matter of law by the sun visors in the 1984 Buick Regal. The district court should have granted GM's motion in limine and prevented DePaepe from arguing to the jury that GM failed to comply with FMVSS 201 s3.4.1.

What led the district court to declare in mid-trial that the regulation is invalid was a belief that a federal rule must do more to promote safety than FMVSS 201 s3.4.1 does as written. The only way to make it do more is to treat it as a performance standard, which is essentially how DePaepe treated it before the district court judge barred further reference to the subject. But as a performance regulation FMVSS 201 s3.4.1 is deficient. It does not answer the critical question: *how much* energy must the visor absorb? The district judge saw this as a failing that required him to deem the standard invalid. But it is a shortcoming only if FMVSS 201 s3.4.1 is required to answer the question "how much." It must do so only if it is a performance standard — which it isn't. The regulation is valid and was complied with. Many regulations accomplish little because they require little, but this does not impugn their validity. Regulations can come in bite sizes as well as jumbo economy sizes.

DePaepe argues that these two errors — allowing two weeks worth of evidence and argument that GM failed to comply with FMVSS 201 s3.4.1 followed by an enforced quietus on the subject — were harmless. See Fed.R.Civ.P.61. According to DePaepe, GM was a beneficiary of the second error and can hardly complain that the plaintiff was stopped in his tracks in an effort to elaborate

a theory of liability. As for the first, DePaepe's lawyer contends that he had introduced the jury to FMVSS s3.4.1 and GM's treatment of that regulation, but was cut off before he could administer the *coup de grace* by showing noncompliance. Again GM was the beneficiary of the judge's timing, the argument concludes. We think this position erroneous both legally and factually. The legal error is DePaepe's assumption that only a plaintiff is entitled to use a federal safety standard to advantage. Not so. Compliance with a safety standard does *not* foreclose tort remedies, see 49 U.S.C. §30103(e), but a manufacturer is entitled to inform a jury that its vehicles pass federal muster and to invite the jury to conclude that a vehicle that complies with all federal rules is safe enough to be on the road. In Illinois, whose law governs this action, compliance with federal safety standards is enough by itself to support a verdict for the manufacturer. *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 303-04, 443 N.E.2d 575, 577 (1982). As for the facts: after a review of the trial transcript, we conclude that much that was said, and more that was implied, during plaintiff's presentation conveyed the view that GM did not comply with FMVSS 201 s3.4.1 and that its certification of compliance was disingenuous. Little purpose would be served by rehearing the evidence and argument. Suffice it to say that no plaintiff would take seven trial days to make his opponent's case before even beginning the work of undermining the defense. When the judge precluded all further reference to FMVSS 201 s3.4.1, GM was behind the eight ball and never had an opportunity to present its side of the matter to the jury.

Two other issues argued on appeal may recur if the parties are unable to resolve their differences on remand and a third trial must be held. We address them briefly in the

hope that the third trial will be the last.

1. DePaepe's theory of liability has evolved since the suit began. Initially, he blamed the car's brake and occupant restrain systems — the former supposedly contributed to the crash, and the latter aggravated the injury. Later counsel added the windshield header and front-end components to the list of supposedly defective systems. In supplemental interrogatories before the second trial, DePaepe pointed to 17 design defects in almost as many different parts of the car. But by the time the second trial got under way, the list was down to the sun visor, which supposedly trapped DePaepe's head in an awkward position during the crash. GM wanted to inform the jury about DePaepe's ambulatory theories, doubtless hoping that the jury would infer that DePaepe hadn't found a real villain but was casting about for a motif that might resonate with a lay audience. The district court invoked Fed.R.Evid. 403 to prevent GM from introducing the pleadings, interrogatory answers, and other documents that would have set the stage for this argument. This decision was within the court's discretion. A court is entitled to keep the jury focused on the claim of liability that requires decision; the judge need not allow the defendant to put the plaintiff's litigation tactics on trial. Inconsistent pleadings are allowable, Fed. R. Civ. P. 8(e)(2), and the use of discovery to winnow or refine theories of liability should not be discouraged. Some things plaintiff's counsel said may have been deceptive — for example, counsel stated to the jury that it is Kenny DePaepe's position, it always has been in this trial, his position, that the sun visor broke his neck." Only the qualifier "in this trial" makes the statement true; the word "always" may have been designed to imply consistency over a longer period. The judge should have corrected this

misleading statement with a few words to the jury, but he did not need to allow GM to hijack the trial as it proposed to do.

2. Stephen Syson, a professional expert witness, provided the principal support for DePaepe's theory that the sun visor was defectively designed. GM contends that Syson offered junk science rather than engineering expertise, see *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and that the district court therefore should have excluded his testimony. Appellate review is deferential. *General Electric Co. v. Joiner*, 118 S.Ct. 512 (1997).

GM complains that Syson had not tested or analyzed sun visor designs before this litigation, but a judge does not automatically abuse his discretion in concluding that an expert can offer useful information without having dealt previously with the product at issue in the case. *Cummins v. Lyle Industries*, 93 F.3d 362, 369 (7th Cir. 1996). The question is not whether the expert has hands-on experience but whether his testimony meets scientific standards of hypothesis testing and support by data. *Tyus*, 102 F.3d at 263; *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996); *Pries v. Honda Motor Co.*, 31 F.3d 543 (7th Cir. 1994). Personal experience may lead to knowledge, see *Roback v. V.I.P. Transport Inc.*, 90 F.3d 1207, 1214-16 (7th Cir. 1996), or the lack of experience may lead an expert to use inappropriate tests, so a court is entitled to be skeptical about testimony by a witness outside his normal field of practice. See *Navarro v. Fuji Heavy Industries, Ltd.*, 117 F.3d 1027, 1031 (7th Cir. 1997); *Braun v. Lorillord Inc.*, 84 F.3d 230, 234-35 (7th Cir. 1996). Still, practical experience is not *essential* to expert testimony and sometimes gets in the way of scientific detachment. *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212,

1216 (7th Cir. 1997).

GM's lawyers lampoon the methods Syson used to test the sun visor and to reach conclusions about the engineering compromises that would optimize a sun visor's performance in light of the risks involved. But their *cri de coeur* is not backed up by references to any body of scientific knowledge. What tests *do* engineers use to resolve questions of the kind Syson addressed? What tests should he have performed? What data did he overlook? Counsel apparently want appellate judges to make a priori judgments about how scientific inquiry should be conducted. That way quackery lies. A profession resolves questions of method in the same way it reaches conclusions about other empirical issues; which method is best is a question itself subject to scientific inquiry. See Kenneth R. Foster & Peter W. Huber, *Judging Science: Scientific Knowledge and the Federal Courts* 137-62 (1997). For all this record reveals, Syson performed the tests that GM's staff engineers or the faculty of MIT use to reach conclusions. (Syson was a design engineer at GM earlier in his career.) A litigant that wants a court of appeals to set aside a district judge's decision to admit expert testimony has to do more than appeal to a lawyer's sense of how science should be done. That is all GM has done, and we therefore lack any basis on which to upset the district court judge's decision, whether or not that decision was correct as an independent matter.

This is not to say that the subject is altogether closed. Some of Syson's performance at trial was unscientific. For example, he attached a 10-pound weight to a sun visor and let it swing at the end of a pendulum, to see how much damage it would do to a concrete block 1-5/8 inch thick if dropped

from a height of 3 feet. Visors more flexible than the one in the 1984 Buick Regal did less damage. But what did this prove about the proper design of automobile visors? Syson called his experiment "interesting, but not scientific". Indeed so. GM is free to renew its objection to this aspect of Syson's testimony, and the district judge should evaluate the scientific provenance and rigor of each of Syson's tests independently using the principles we have mentioned.

On one issue we are confident that the district judge erred by allowing Syson to testify, and repetition should not be permitted at a retrial. DePaepe's lawyer asked Syson why GM had reduced the amount of padding in its sun visors. He replied that GM had done so to save money. (GM's position is that it cut the padding because excessively thick sun visors pose hazards of their own.) The district court overruled GM's objection to Syson's testimony about motive or purpose, remarking that "as an expert, he can speculate." With all respect to the district court, the whole point of *Daubert* is that experts can't "speculate". They need analytically sound bases for their opinions. District courts must be careful to keep experts within their proper scope, lest apparently scientific testimony carry more weight with the jury than it deserves. Syson lacked any scientific basis for an opinion about the motives of GM's designers. He could give an opinion as an engineer that reducing the padding saved a particular amount of money; he might testify as an engineer that GM's explanation for the decision was not sound (from which the jury might infer that money was the real reason); but he could not testify *as an expert* that GM had a particular motive. Because Syson did not participate in the deliberations leading to the design of the sun visor, he could not testify as a fact witness on the subject, either.

The judgment of the district court is vacated, and the case is remanded for further proceedings consistent with this opinion and our 1994 opinion. This time, Circuit Rule 36 will apply on remand.

A true copy:

Teste: _____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASE NUMBER: 88 C 10317

FILED
August 27, 1996
JUDGE GEORGE W. LINDBERG
UNITED STATES DISTRICT COURT

Kenneth DePaepe	)	
	)	
vs.	)	**JUDGMENT IN A**
	)	**CIVIL CASE**
General Motors Corporation	)	

_____/

_X_ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

____ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED on the damages claim, the jury finds in favor of the plaintiff, Kenneth DePaepe. The jury finds that the total amount of damages suffered by Kenneth DePaepe as a result of the occurrence in question is

$12,617,600.00 less the agreed upon amount of $50,000.00 paid by Rosemary Galganski-Barlett. On the plaintiff's claim for willful and wanton conduct, the jury finds for General Motors Corporation and against the plaintiff, Kenneth DePaepe.

August 27, 1996
Date

H. Stuart Cunningham
Clerk

/s/ Sandra Booth
(By) Deputy Clerk

APPENDIX C

OPINION AND ORDER

October 10, 1996

Defendant General Motors has moved for judgment as a matter of law with respect to the jury liability verdicts against it on Count I (strict liability) and Count II (negligence). It claims that there was no legally sufficient evidentiary basis for the jury to have found for plaintiff on either of these claims. "In diversity cases, state law supplies the standard to be applied to motions for directed verdict and JNOV." Jackson v. Bunge Corp., 40 F.3d 239, 242 (7th Cir. 1994) (citations omitted). Under Illinois law, a motion for judgment as a matter of law is proper only when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." Id. (citing Pedrick v. Peoria & Eastern R.R., 37 Ill.2d 494, 229 N.E.2d 504, 513-14 (1967)). The court finds that this is not such a case, and denies the motion for judgment as a matter of law.

General Motors also requested a new trial pursuant to Rule 59, citing as support a number of evidentiary rulings the court made during trial. The court will rely on those previous rulings and deny the motion for a new trial.

Last, General Motors requests remittitur of the jury award, asserting that the evidence supported only $1.6 million in economic damages and the award of $12.6 million was

therefore excessive. Federal courts sitting in diversity apply a federal standard when reviewing a jury verdict, although they may refer to state standards. Pincus v. Pabst Brewing Co., 893 F.2d 1544, 1554 (7th Cir. 1990). Only awards that are "monstrously excessive" or born of passion and prejudice may be altered. Id. Plaintiff became a ventilator-dependant quadriplegic as a result of his accident and was permanently and totally disabled. Considering the nature and extent of plaintiff's injuries, their permanence, and the effect they had on his life, the court finds that the award was not so excessive that remittitur is proper. The court also notes that the jury declined to award punitive damages, which indicates that it was not influenced by passion or prejudice against General Motors. Therefore, it denies defendant's motion for remittitur.

/s/_____
George W. Lindberg

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 88 C 10317

KENNETH DePAEPE, Plaintiff,	) JUDGE GEORGE W. LINDBERG
vs.	)
GENERAL MOTORS CORPORATION, Defendant.	)

MEMORANDUM AND ORDER

Plaintiff, Kenneth DePaepe, has orally moved that this court reconsider its prior ruling that defendant be permitted to offer evidence regarding the seat belt in the Buick Regal. Plaintiff's argument is that this court was incorrect in ruling that plaintiff waived his argument "that federal preemption precludes defendant from offering any evidence regarding the seat belt." Plaintiff bases his motion on two cases: International Longshoremen's Association, AFL-CIO v Davis, 476 US 378 (1986), and Pedraza v Shell Oil Company, 729 F Supp 187 (D Mass 1990). Assuming plaintiff is correct and the preemption claim he makes is not subject to waiver, federal preemption would not preclude defendant from

presenting the seat belt evidence in this case.

Plaintiff's argument is:

> In this case, plaintiff has alleged that the sun visors supplied by the defendant in the subject 1984 Buick Regal violated FMVSS 201 § 3.4.1. Plaintiff proposes to offer expert testimony to establish that allegation. The defendant General Motors now seeks to introduce seat belt evidence to establish that the vehicle "as a whole" was reasonably crashworthy and that the seat belt, if properly used, would prevent occupant impact against the sun visor component. Moreover, the jury is to be specifically instructed by the court that they may consider defendant's seat belt evidence in assessing the plaintiff's claims against the sun visor. Manifestly this would allow the jury to establish a performance standard for the sun visor far different from that mandated by FMVSS 201 § 3.4.1 Section 3.4.1 establishes a performance requirement for the sun visor and makes no reference whatsoever to the seat belt. The seat belt evidence proffered by the defendant, however, plainly allows and is intended to allow the jury to ignore or diminish the performance requirements of Section 3.4.1. The effect of allowing such seat belt evidence to be "considered" by the jury in relation to defendant's obligations under 3.4.1 directly violates 49 USC Section 30103(b) and the host of federal cases which have been decided thereunder.

Plaintiff is thus arguing that the applicable statute explicitly preempts any state standard that would permit a consideration

of overall crashworthiness in relation to the design of the sun visor. See Freightliner Corporation v. Myrick, 115 S Ct 1483, 187-88 (1995) (distinguishing between express and implied preemption).

The statute upon which plaintiff's preemption claim rests states:

> Whenever a federal motor vehicle safety standard established under this sub-chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 USCA § 1392(d) (West 1982) (repealed July 5, 1994). See also 49 USC § 30103(b) (similar provision added July 5, 1994). To determine whether preemption applies, it is necessary to determine whether there was in effect a Federal motor safety vehicle standard applicable to the same aspect of performance of the Buick Regal's sun visor as a state standard.

With respect to motor vehicle safety standards, the statute states:

> Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

15 USCA § 1392(a) (West 1982). See also 49 USC § 30111(a) (similar provision added July 5, 1994). Federal Motor Vehicle Safety Standard (FMVSS) 3.4.1 states:

> S1. Purpose and scope. This standard [Standard 201] specifies requirements to afford impact protection for occupants.
>
> . . . .
>
> S3. Requirements for instrument panels, seat backs, interior compartment doors, sun visors, and armrests. Each vehicle shall comply with the requirements specified in S3.1 through S3.5.2.
>
> S3.4 Sun visors
>
> S3.4.1 A sun visor that is constructed of or covered with energy-absorbing material shall be provided for each front outboard designated seating position.

49 CFR § 571.201, S1, S3, S3.4.1. In this litigation, S3.4.1 has been subject to radically different interpretations.

Defendant, General Motors Corporation, has interpreted it as permitting the sun visor to be constructed of or covered with any material. This is because all materials are energy-absorbing to a greater or lesser degree. Thus, a hunk of steel or concrete would meet the requirements of this standard. If correct, this interpretation would render S3.4.1 invalid because it would not "meet the need for motor vehicle safety." 15 USCA § 1392(a) (West 1982).

Plaintiff notes:

> Federal Register, Vol 47 No. 112, Thursday, June 10, 1982 regarding interpretation of Section 201 by NHTSA states:
>
> > Standard 201 sets performance requirements for . . . sun visors . . . to prevent or reduce injuries to persons thrown against them in crashes.

In this regard, S1's statement of the purpose and scope of Standard 201 as being to specify "requirements to afford impact protection for occupants" is also significant. From these statements, plaintiff interprets S3.4.1 as imposing a requirement that the sun visor "afford occupants reasonable protection against interior impact." This interpretation would also lead to the conclusion that S3.4.1 is not valid, because if it requires "reasonable protection against interior impact" S3.4.1 is not stated in objective terms and is not practicable. 15 USCA § 1392(a) (West 1982). It would not be stated in objective terms and would not be practicable for essentially the same reason: It would be impossible to say ahead of time what manner of construction of a sun visor would satisfy such a standard. Compare 49 CFR § 571.201, S3.5.1 (very specific, objective requirements stated for armrests).

Another interpretation of S3.4.1 that had been considered by the court was one of minimal protection. Under this interpretation, the standard would have required that the sun visor be constructed in or covered with some material that was at least more energy absorbing than some material like steel, but would not have required more. It was

an attempt to give S3.4.1 some effect, which defendant's interpretation would not have given it, yet to avoid establishing standards beyond those contemplated by the Secretary, which is what plaintiff's interpretation would have done. Such an interpretation of S3.4.1 as requiring minimal protection, apart from any other difficulties it would create, would also result in S3.4.1 being invalid because it would result in S3.4.1 not being stated in objective terms and it may well also be impracticable. 15 USCA § 1392(a) (West 1982).

The portion of Standard 201 relating to sun visors, S3.4.1, was at all relevant times invalid because it did not satisfy the requirements of 15 USCA § 1392(a) (West 1982) (repealed July 5, 1994). See also 49 USC § 30103(b) (similar provision added July 5, 1994). Therefore, plaintiff's claim that the seat belt evidence is precluded by federal preemption is incorrect, so that even if the prior ruling that plaintiff's federal preemption argument was waived was incorrect, the seat belt evidence would be admissible. Plaintiff's oral motion that this court reconsider its ruling that the seat belt evidence was admissible will be denied.

In addition, the court notes sua sponte, that the invalidity of S3.4.1 means that (1) evidence regarding compliance or non-compliance with that standard is irrelevant and so inadmissible; (2) argument regarding compliance or non-compliance with that standard will not be permitted; and (3) the jury will not receive instructions concerning S3.4.1, with the possible exception of an appropriate instruction that the jury disregard S3.4.1 and any evidence relating to compliance or non-compliance with it.

ORDERED: Plaintiff Kenneth DePaepe's oral motion

that this court reconsider its ruling that the seat belt evidence was admissible is denied.

The court, sua sponte, orders that (1) evidence regarding compliance or non-compliance with that standard is irrelevant and so inadmissible; (2) argument regarding compliance or non-compliance with that standard will not be permitted; and (3) the jury will not receive instructions concerning S3.4.1, with the possible exception of an appropriate instruction that the jury disregard S3.4.1 and any evidence relating to compliance or non-compliance with it.

ENTER:

/s/_____
GEORGE W. LINDBERG
District Judge

DATED: JUL 30, 1996

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

DATED
May 4, 1998

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MICHAEL K. DEPAEPE, executor of the estate of Kenneth J. DePaepe,)	No. 88 C 10317
Plaintiff-Appellee,	) George W. Lindberg,) *Judge*
No. 96-3886 v.	)
GENERAL MOTORS CORPORATION,	)
Defendant-Appellant.	)

/

ORDER

Plaintiff-appellee filed a petition for rehearing and suggestion of rehearing en banc on April 23, 1998. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX F

DISTRICT COURT'S ORAL OPINION
DENYING MOTION FOR MISTRIAL
JULY 31, 1996

* * *

[p.1499]

review a final action of the Secretary of Transportation under this part shall be brought in the appropriate Court of Appeals as provided in Chapter 158, Title 28."

This is not a proceeding to judicially review an order or a final action of the Secretary of Transportation and, therefore, Nader does not apply.

Plaintiff's oral motion for reconsideration is denied.

Defendant has moved for a mistrial on the ground that no cautionary instruction would be sufficient for the jury to decide this case without consideration of evidence the Court has now ruled inadmissible, and argument the Court has now ruled improper regarding Section 3.4.1.

Granting a mistrial at this juncture would result in a great waste of judicial resources and of the resources of the parties.

The Court is especially concerned with the hardship to plaintiff if the costs of this action are multiplied by beginning

the trial anew.

These concerns, weighty though they are, would not keep this Court from granting a mistrial if the Court was of the opinion that this case was one in which the trite phrase about not being able to unring the bell, or to unscramble the omelette, applied with particular force.

However, the Court is of the opinion that an

[p.1500]

appropriate cautionary instruction in this case will be no less effective than it is in other cases.

The evidence and statements of the jury will be told — the evidence and the statements of the jury — I'm sorry — that the jury will be told to disregard are not of a particularly emotional nature, so they are not likely to inflame the jury against the defendant.

The Court is convinced that a cautionary instruction at this time coupled with the opportunity the parties will have during the balance of the case and during closing arguments to present evidence and argument on the issues the jury will be deciding, and a repetition of the cautionary language in the jury instructions, will suffice to properly guide the jury as to what it is not to consider.

And the Court is further convinced that the jury will follow the Court's instructions in this regard.

Therefore, the defendant's motion for a mistrial is

denied.

Plaintiff has requested that the trial be permitted to go forward as if this Court had not ruled that Section 3.4.1 was invalid, and that the jury be given two sets of verdict forms, or be given only one set of verdict forms along with a special interrogatory to permit it to indicate how it would have decided the case both with and without consideration of the evidence concerning 3.4.1.

APPENDIX G

CURATIVE INSTRUCTION

AUGUST 5, 1996

* * *

[p.1551]

(The following proceedings were had in open court, in the presence and hearing of the jury.)

THE COURT: Good morning. A long time no see.

Let me just point out, before we begin GM's cross-examination of Mr. Syson, that we have been working while you have been excused.

We have been working exclusively on matters that had to be worked out in this case, and so we have not been wasting your time.

We hope we have been saving your time, but some of these things just have to be done as they come along and that's what we have been doing.

Resultantly, I have an instruction that I want to give at this time and, also, it will be included in the instructions at the end of the case.

You will have a copy of this instruction to take with

you to the jury room after the case is over and when you begin your deliberations.

But let me say this. Rather than having you concentrate on taking notes on this right now, let me read it twice to make sure that you have it. It's reasonably — it's not real easy.

You have heard evidence in this case concerning Federal Motor Vehicle Safety Standard 201, Section 3.4.1, relating to sun visors.

[p.1552]

For reasons about which you should not speculate, I am striking all prior testimony and other evidence which relates solely to section 3.4.1, and all evidence relating solely to compliance or noncompliance with Section 3.4.1.

You must disregard all such evidence.

Evidence that relates in part to Section 3.4.1 or compliance or noncompliance with Section 3.4.1, and in part to some other issue or issues in the case is not stricken, but is received only for the limited purpose of your consideration of the other issue or issues.

Specifically, you are not precluded by this instruction from considering any evidence relating to the energy absorbing capacity of the sun visor — sun visors in determining whether the 1984 Buick Regal's sun visors were unreasonably dangerous and/or whether General Motors was negligent in the design or testing of the visors.

However, when deliberating on a verdict in this case, you are not to consider any aspect of Section 3.4.1, or any testimony or other evidence that has been stricken by the Court and evidence admitted for the limited purposes is only to be considered for those purposes for which it was admitted.

Now, let me read it again because there is a lot of concepts that you have to grab here.

You have heard evidence in this case concerning

[p.1553]

Federal Motor Vehicle Safety Standard 201, Section 3.4.1 relating to sun visors.

For reasons about which you should not speculate, I am striking all prior testimony and other evidence which relates solely to three -- section 3.4.1, and all evidence relating solely to compliance or noncompliance with Section 3.4.1.

You must disregard all such evidence.

Evidence that relates in part to Section 3.4.1 or compliance or noncompliance with Section 3.4.1, and in part to some other issue or issues in the case, is not stricken but is received only for the limited purpose of your consideration of the other issue or issues.

Specifically, you are not precluded by this instruction from considering any evidence relating to the energy absorbing cpacity of the sun visors in determining whether the

1984 Buick Regal's sun visors were unreasonably dangerous and/or whether General Motors was negligent in the design or testing of the visors.

However, when deliberating on a verdict in this case, you are not to consider any aspect of Section 3.4.1, or any testimony or other evidence that has been stricken by the Court, and evidence admitted for limited purposes is only to be considered for those purposes for which it was admitted.

Okay. Mr. Burke, cross-examination.

(1)

FILED
NOV 9 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL K. DEPAEPE, EXECUTOR OF THE ESTATE OF KENNETH J. DEPAEPE,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

PAUL T. CAPPUCCIO
Counsel of Record
THEODORE W. ULLYOT
ADAM G. CIONGOLI
KIRKLAND & ELLIS
655 Fifteenth Street
Washington, D.C. 20005
(202) 879-5000

Counsel for Respondent General Motors Corporation

November 9, 1998

36 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals properly hold that the errors committed by the District Court were not harmless?

2. Did the Court of Appeals properly hold that Federal Motor Vehicle Safety Standard 201 §3.4.1—which requires cars to be equipped with "[a] sun visor that is constructed of or covered with energy-absorbing material"—does not impose a specific performance standard?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 31, 1997.

Aisin GM Allison Co., Ltd.
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Componentes Para Automotores, S.A. de C.V.
Delphi Cableados, S.A. de C.V.
Delphi France Automotive Systems
Delphi Calsonic Compressors, S.A.S.
Delphi Chassis Systems Krosno
Delphi Harrison-Calsonic
GMC Truck Motors Development Corporation
GM Ovonic L.L.C.
General Motors de Argentina S.A.
General Motors (Thailand) Ltd.
General Motors Automobiles Philippines, Inc.
General Motors Colmotores, S.A.
General Motors Holding Espana, S.A.
General Motors Holdings (U.K.)
General Motors Kenya Limited
GM Holding (Portugal) SGPS, Lda.
General Motors Investment Services Company N.V.
General Motors Peru S.A.
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
Provencorp S.A.
P.T. Packard Kabelindo Murni Indonesia
Radiadores Richard, S.A.

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INTRODUCTION

According to Petitioner, the Seventh Circuit's decision in this products liability case creates a circuit split on a "vitally important issue," and threatens to "have a major impact on the construction and enforceability of motor vehicle safety standards." Pet. at 14, 20. The Court should not be misled by this statement. As we explain below in this Opposition, this case is paradigmatically uncertworthy:

First, the circuit split that Petitioner claims to have identified —concerning the proper construction of federal motor vehicle safety standards ("FMVSS")—is nonexistent. Moreover, the Seventh Circuit's interpretation of the particular FMVSS at issue, which aligns precisely with the view of the agency that promulgated it, was entirely correct.

Second, the Seventh Circuit's interpretation of the FMVSS at issue in this case is neither dispositive of the case, nor really even the primary issue in the case. Rather, the dispositive issue in this case is the Seventh Circuit's independent holding that Respondent General Motors Corporation ("GM") was unfairly prejudiced by the district court's sudden, *sua sponte*, mid-trial reversal of course on the critical question whether evidence would be admitted regarding GM's alleged noncompliance with the FMVSS at issue. The district court initially had allowed Petitioner to present seven days of testimony aimed at establishing that GM had *not* complied with the FMVSS, but then (after *sua sponte* invalidating the regulation) barred GM from presenting any evidence to rebut Petitioner's testimony regarding the FMVSS. The Court of Appeals held that it was error to impose on GM this mid-trial "enforced quietus" on the subject of FMVSS compliance, and that such error was not harmless. In challenging this independent basis for reversal, Petitioner merely takes issue with the Seventh Circuit's harmless error analysis. In reality, therefore, the Petition presents nothing more significant than the question whether the Court of Appeals' harmless error ruling was correct. Petitioner offers no explanation as to why the Court should grant review

to consider a case-specific application of well-settled harmless error law.

Finally, even reversing the Court of Appeals' routine harmless error holding would not entirely dispose of this case. That is so because the Court of Appeals also held that the district court erred in allowing Petitioner's expert to testify that the reason why GM designed the product at issue the way it did was to save money. That error was grossly prejudicial, and alone suffices to require a new trial. Petitioner has not even challenged this third, independent ground for vacating the judgment and ordering a new trial.

COUNTERSTATEMENT OF THE CASE

In 1984, Kenneth J. DePaepe was involved in an automobile accident while driving a 1984 Buick Regal. Mr. DePaepe was rendered quadriplegic in the accident, and filed suit against GM. After a full trial in 1992, a jury returned a complete defense verdict for GM. The Seventh Circuit, however, in 1994 ordered a new trial on the ground that it could not be certain that an error in one of the district court's jury instructions was harmless. *See* 37 F.3d 373 (7th Cir. 1994). This case thus arises from the re-trial of Mr. DePaepe's lawsuit. *See* Appendix to Petition for Writ of Certiorari ("App.") at 1a-2a.

At various stages of this case, Petitioner[1] has pointed to at least ten different alleged defects with his Buick Regal as

---

[1] Kenneth DePaepe died in 1997, while this case was on appeal in the Seventh Circuit. Accordingly, the Petitioner is not Kenneth DePaepe, but rather his son and executor Michael DePaepe. To avoid confusion, however, this brief will use the term "Petitioner" to refer to the party that is pursuing legal action against GM, regardless of whether that party is, at the time in question, Kenneth DePaepe or his executor.

having been responsible for his injuries.[2] On re-trial, Petitioner settled on the principal theory that the *sun visor* of his car had been defectively designed. Petitioner, who was unbelted at the time of his collision, maintained that the sun visor was insufficiently padded to prevent him from breaking his neck when the force of the collision caused his head to strike the sun visor/headliner on the passenger side of the vehicle.[3] *Id.*

I. Proceedings in the District Court.

Prior to trial, GM learned that Petitioner intended to prove this supposed padding defect primarily by arguing to the jury that GM had failed to comply with FMVSS 201 § 3.4.1. That standard provides that motor vehicles must be equipped with "[a] sun visor that is constructed of or covered with energy-absorbing material." 49 C.F.R. 571.201 § 3.4.1 (1996).[4] The sun visor in Petitioner's car consisted of fiberboard mounted on a metal sleeve, covered with energy-absorbing polyurethane

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[2] In addition to the defective-sun-visor theory upon which he ultimately settled, Petitioner at various stages of the first and second trials has identified the following components of the 1984 Buick Regal as being allegedly defective or unsafe, and as having contributed to or caused his injuries: (i) the brake design; (ii) the steering; (iii) the windshield header; (iv) the seat and seat back; (v) the headliner; (vi) the driver's seat belt; (vii) the shoulder harness; (viii) the front-end integrity; (ix) the overall stability of the vehicle; (x) the lack of an air bag; and (xi) the seat belt warning system. *See* Appendix of Appellant General Motors Corporation in *DePaepe v. General Motors Corp.*, No. 96-3886 (7th Cir.) ("CA7 App.") 399, 464, 515-60.

[3] Petitioner incorrectly asserts that the parties were "in agreement that Kenneth DePaepe's neck broke when his head was caught on the sun visor." Pet. at 6. GM never agreed that Mr. DePaepe's head was "caught on" the visor, but instead merely did not dispute that petitioner broke his neck *when* he came into contact with the visor (and any other interior component he contacted as a result of being involved in a violent collision while not wearing his seat belt).

[4] As Petitioner notes, *see* Pet. at 7 n.3, the standard is now FMVSS 201 § 5.4.1, and is found at 49 C.F.R. § 571.201 § 5.4.1, but remains unchanged.

foam and woven cloth; it was (and remains) undisputed that the foam covering is energy-absorbing material. Appendix of Appellant General Motors Corporation in *DePaepe v. General Motors Corp.*, No. 96-3886 (7th Cir.) ("CA7 App.") 202-209, 231, 283. Accordingly, GM filed a motion in limine asking the district court to exclude any evidence of supposed noncompliance with FMVSS 201 § 3.4.1, and to instruct the jury that GM had complied with the standard. App. 2a-4a.

In its motion, GM argued that admitting testimony regarding compliance with FMVSS 201 § 3.4.1 would be improper because, among other reasons, FMVSS 201 § 3.4.1 does not impose a "performance" requirement with respect to the energy-absorbing capabilities of sun visors—that is, the standard does not specify "how much" energy the covering material must absorb. Moreover, GM argued that under settled Seventh Circuit precedent, it was up to the court, not the jury, to determine compliance with federal safety standards. App. 2a.

In response to the motion in limine, Petitioner argued—as he does again in this Court—that even though the plain terms of FMVSS 201 § 3.4.1 do not specify "how much" energy the sun visor covering must absorb, the regulation should nonetheless be interpreted as imposing a "performance standard." Specifically, Petitioner's view is that FMVSS 201 § 3.4.1 implicitly requires that sun visors provide "reasonable protection," and it is up to the jury, not the court, to determine what constitutes "reasonable protection." App. 2a-4a.

The district court issued two rulings regarding FMVSS 201 § 3.4.1, and these rulings figured prominently in GM's later appeal.

First, the district court denied GM's motion in limine. Accepting Petitioner's theory, the Court interpreted FMVSS 201 § 3.4.1 as imposing a generalized performance standard that the energy-absorbing materials of sun visors must provide

occupants with "reasonable protection," and held that it would be up to the jury to determine what level of protection is "reasonable." CA7 App. 125. Pursuant to this ruling, Petitioner began his case by presenting seven days of argument and evidence in support of his claim that GM had not complied with FMVSS 201 § 3.4.1.[5] *See* App. 2a-3a, 5a; CA7 App. 200-06, 208-14.

Second, after Petitioner had presented this extensive evidence regarding GM's supposed noncompliance with the standard, the district court—acting *sua sponte* and without warning the parties—"stunned everyone by declaring FMVSS 201 § 3.4.1 invalid and forbidding either side to mention it again in the jury's presence." App. 3a. The district court declared the standard invalid because, in the court's view, it violated 15 U.S.C. § 1392(a) (1982),[6] which requires federal motor vehicle safety standards to "be practicable, meet the need for motor vehicle safety, and . . . be stated in objective terms." *Id.* at 3a, 5a.

As the Seventh Circuit noted, both sides "were flummoxed" by the district court's mid-trial invalidation of the standard.

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[5] In the Court of Appeals, Petitioner argued that he had not presented evidence of GM's alleged noncompliance, because although he introduced the jury to FMVSS 201 § 3.4.1 and to GM's treatment of the regulation, he was (as a result of the district court's subsequent invalidation of the standard, *see infra*) "cut off before he could administer the *coup de grace* by showing noncompliance." App. 5a. The Seventh Circuit rejected that version of events, explaining that "after a review of the facts, we conclude that much that was said, and more that was implied, during plaintiff's presentation conveyed the view that GM did not comply with FMVSS 201 § 3.4.1 and that its certification of compliance was disingenuous." *Id.* Although Petitioner again asserts (in his Statement of the Case) that he "presented no direct evidence that the visor violated FMVSS 201 § 3.4.1," he does not challenge the Seventh Circuit's ruling that his evidence "conveyed the view that GM did not comply."

[6] Section 1392(a) has since been recodified as 49 U.S.C. § 30111(a).

Id. at 3a. Petitioner's counsel strenuously objected to this ruling, arguing that the district court lacked authority to invalidate the standard. *Id.*; CA7 App. 342. GM, for its part, moved for a mistrial on the ground that the jury would be unable to disregard the evidence and argument Petitioner had presented to that point regarding GM's alleged noncompliance with the standard. *Id.* at 103. In his effort to convince the district court that it had erred in invalidating the standard, *Petitioner's counsel* concurred with GM's assessment, agreeing that it would be "*impossible to erase what this jury has heard on this subject from their minds*"—*i.e.*, that a curative instruction would be ineffective. *Id.* at 341-42, 347.

Unpersuaded by the parties' protests, the district court proceeded with the trial. The court instructed the jury to disregard the seven days of evidence of GM's supposed failure to comply with FMVSS 201 § 3.4.1, and prohibited the parties from making any further mention of the standard.[7] App. 3a, 4a.

One final ruling by the trial court is relevant to the Petition. Stephen Syson, a professional expert witness who testified in support of Petitioner's defective design theory, was asked by Petitioner's counsel to opine as to why GM reduced the amount of padding in its sun visors. Although lacking any basis to offer an opinion on this question, Syson replied that GM had done so to save money. The district court overruled GM's objection to this testimony, stating that "as an expert, he can speculate." CA7 App. 371.

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[7] GM objected to the particular "curative" instruction given by the district court. This objection was based on the fact that the instruction told the jury to disregard all evidence relating to FMVSS § 3.4.1, but then went on to state that *the jury could nonetheless consider* "evidence that relates in part to Section 3.4.1 or compliance or noncompliance with Section 3.4.1" if that evidence also related "in part to some other issue or issues in the case," such as "whether the 1984 Buick Regal's sun visors were unreasonably dangerous and/or whether GM was negligent in the design or testing of the visors." App. 28a-29a.

The jury rendered a $12.6 million verdict in Petitioner's favor. GM filed post-trial motions for judgment as a matter of law and for a new trial, both of which were denied.

II. Proceedings in the Court of Appeals.

A. The parties' arguments.

GM appealed to the Seventh Circuit, and the district court's handling of FMVSS 201 § 3.4.1 figured prominently among GM's arguments for reversal. GM thus argued, *first*, that the district court had erred in denying GM's motion in limine, because that denial was based on the district court's mistaken view that FMVSS 201 § 3.4.1 constituted a "performance standard" rather than a mere "design standard." *Second*, and relatedly, GM argued that the district court had erred by delegating to the jury the responsibility for determining whether GM had complied with the safety regulation. *Third*, GM urged that the district court was without authority to invalidate FMVSS 201 § 3.4.1. *Finally*, GM maintained that the district court had further erred, following its invalidation of the standard, by refusing to allow GM to rebut Petitioner's evidence of noncompliance; GM argued that the district court was bound either to allow such rebuttal, or to grant a mistrial. *See* Brief for Appellant General Motors Corporation in *DePaepe v. General Motors Corp.*, No. 96-3886 (7th Cir.) ("GM CA7 Br.") at 21-33. In addition to these FMVSS-related claims of error, GM argued that the district court had erred by allowing Syson to speculate regarding GM's motives for reducing the amount of padding in the sun visor. *Id.* at 39-44.[8]

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[8] On appeal, GM did not assert the district court's ruling on the new trial motion as a separate and independent assignment of error; instead, it challenged the district court's various rulings in the context they were rendered (*e.g.*, GM challenged the district court's denial of its motion *in limine* regarding FMVSS 201 § 3.4.1).

GM expressly acknowledged that "[a]n error is harmless if it does not affect the substantial rights of the parties," but explained that "allowing the jury to hear extensive evidence suggesting that GM violated FMVSS 201 was certainly not harmless error in this case." *Id.* at 25; *see also id.* at 31-32, 33 ("Once again, the error here is not harmless, and requires reversal."). To that end, GM highlighted the concessions by Petitioner's counsel that the jury could not be expected to disregard the FMVSS evidence it had heard, and cited Seventh Circuit precedent for the proposition that the prejudice created by the one-sided introduction of evidence constitutes reversible error. *Id.* at 31-32 (citing *Public Serv. Co. of Ind., Inc. v. Bath Iron Works Corp.*, 773 F.2d 783, 790 (7th Cir. 1985) (finding prejudicial error where "the trial court's rulings resulted in a situation in which plaintiffs were able to present testimony about [a key issue,] but [defendant] was prevented from presenting its version of that issue in any cohesive and complete fashion.")).

GM also acknowledged that the district court had, following its imposition of the enforced quietus, instructed the jury to disregard the extensive evidence that Petitioner had presented regarding GM's alleged noncompliance with FMVSS 201 § 3.4.1. GM argued, however, that the issue of its compliance with the federal safety standard "had been so central in the trial that it was utterly unrealistic to believe that a curative instruction would suffice." GM CA7 Br. at 31 (citing *Joseph v. Brierton*, 739 F.2d 1244, 1248 (7th Cir. 1984) ("[W]e must reverse [if the court gives] a curative instruction that we are convinced could not have cured"); *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977) ("cautionary instructions are effective only up to a certain point," which is passed "after repeated exposure of a jury to prejudicial information")). In addition, GM argued that even if, in theory, a curative instruction could have sufficed, the particular curative instruction given by the district court in this case was inadequate. GM CA7 Br. at 32-33.

In response, Petitioner concentrated his efforts on establishing that any errors made by the district court were indeed harmless, and that the curative instruction given by the trial court was adequate. Petitioner acknowledged, however, that although jurors are presumed to follow instructions to disregard inadmissible evidence, that presumption may be overcome if "'there is an overwhelming probability that the jury will be unable to follow the court's instructions and strong likelihood that the effect of the evidence would be devastating.'" Brief for Appellee DePaepe in *DePaepe v. General Motors Corp.*, No. 96-3886 (7th Cir.) ("DePaepe CA7 Br.") at 18 (quoting *Raybestos Products v. Younger*, 54 F.3d 1234, 1239 (7th Cir. 1995)).

Petitioner also defended the district court's initial ruling that FMVSS 201 § 3.4.1 imposed a performance standard on sun visors—just as Petitioner now defends that ruling in his Petition. *Id.* at 20-23. In the Court of Appeals, however, Petitioner did not make certain of the arguments on this score that he now advances. Specifically, Petitioner did not contend that the National Highway Traffic Safety Administration ("NHTSA")—the agency that promulgated and administers the federal motor vehicle safety standards—lacks the authority to enact "design standards." *Compare* Pet. at 14-17. Nor did he contend that other courts of appeal had ruled that "design standards" were impermissible under the authorizing legislation. *Compare* Pet. at 18.[9]

At oral argument, Petitioner again focused on the issue of harmless error—to the point, even, of unveiling large

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[9] Petitioner offered other arguments in defense of the trial result that are not relevant to the Petition. For example, Petitioner argued that GM had waived various claims of error, and (reversing the position he had taken at trial) claimed that the district court did possess the authority to invalidate FMVSS 201 § 3.4.1.

demonstrative exhibits on which the Seventh Circuit's well-settled harmless error standards were displayed.

B. The court's ruling.

The Seventh Circuit reversed, holding that the district court had committed two errors in its handling of FMVSS 201 § 3.4.1, and a third error with respect to the testimony of Petitioner's expert.

The district court's *first* error, according to the Court of Appeals, was denying GM's motion in limine regarding FMVSS 201 § 3.4.1. The Seventh Circuit held that the standard "was satisfied as a matter of law by the sun visors in the 1984 Buick Regal," and that the district court therefore "should have granted GM's motion in limine and prevented [Petitioner] from arguing to the jury that GM failed to comply with FMVSS 201 § 3.4.1." App. 4a.

The standard was satisfied as a matter of law, according to the Court of Appeals, because it is a "design standard" (specifying only "what a component of a vehicle must be") rather than a "performance standard" (which specifies "what the component must accomplish"). *Id.* at 3a. The Seventh Circuit noted that "FMVSS 201 § 3.4.1 is written as a design standard," and that NHTSA had, in official agency statements, confirmed that the regulation is not a performance standard. *Id.* Because "GM covered the sun visors in 1984 Buick Regal cars with nylon backed by polyurethane foam," and "[n]o one doubts that polyurethane foam dissipates energy when compressed," the Court of Appeals concluded that FMVSS 201 § 3.4.1 (which, again, requires only that cars be equipped with "[a] sun visor that is constructed of or covered with energy-absorbing material") "was satisfied as a matter of law." *Id.* at 3a-4a.

The Court of Appeals also ruled that the district court had committed a *second*, independent error—namely, "declaring FMVSS 201 § 3.4.1 invalid and forbidding either side to

mention it again in the jury's presence," *after* Petitioner had already presented seven days of argument and evidence of GM's supposed noncompliance with the standard. *Id.* As the Court of Appeals explained, GM had "wanted to answer [Petitioner's] presentation (in lieu of which it wanted a mistrial) and to argue on its own behalf that the visor's compliance with FMVSS 201 § 3.4.1 is a reason to conclude that the design was not defective." *Id.* at 3a. The Court of Appeals explained that GM was entitled to make that argument, because "a manufacturer is entitled to inform a jury that its vehicles pass federal muster and to invite the jury to conclude that a vehicle that complies with all federal rules is safe enough to be on the road." *Id.* at 5a.[10] When—after having allowed Petitioner to spend several days arguing to the jury that GM had failed to comply with FMVSS 201 § 3.4.1—the district court precluded all further reference to the standard, "GM was behind the eight ball and never had an opportunity to present its side of the matter to the jury." *Id.*

Significantly, the Court of Appeals went on to consider, and reject, Petitioner's argument "that these two errors—allowing two weeks worth of evidence and argument that GM failed to comply with FMVSS 201 § 3.4.1 followed by an enforced quietus on the subject—were harmless." App. 4a-5a.

At this juncture, it bears mentioning that Petitioner has overlooked the second of the two errors that formed the basis for the Seventh Circuit's reversal. Petitioner thus describes the Seventh Circuit as having reversed based solely on its conclusions that (1) "respondent should have been able to tell the jury that it complied with the standard as a matter of law," and (2) "[P]etitioner should not have been allowed to introduce

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[10] As the Court of Appeals noted, under the governing Illinois law, "compliance with federal safety standards is enough by itself to support a verdict for the manufacturer." *Id.* (citing *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 303-04, 443 N.E.2d 575, 577 (1982)).

evidence that implied that the standard was violated." *See* Pet. at 13; *see also id.* at 24. The Court of Appeals' opinion, however, plainly identifies "two errors—allowing two weeks worth of evidence and argument that GM failed to comply with FMVSS 201 § 3.4.1 followed by an enforced quietus on the subject." App. 4a.

The Court of Appeals did make the two findings mentioned by Petitioner, but counted those not as separate errors, but rather as two components of a single error—namely, the district court's erroneous denial of GM's motion in limine. *See* App. 4a ("FMVSS 201 § 3.4.1 . . . was satisfied as a matter of law by the sun visors in the 1984 Buick Regal. The district court should have granted GM's motion in limine and prevented DePaepe from arguing to the jury that GM failed to comply with FMVSS 201 § 3.4.1."). And the Court of Appeals also plainly identified as a *second and independent* error the district court's failure either to allow GM to respond, or to grant a mistrial, after having allowed Petitioner to put on two weeks worth of evidence regarding GM's alleged noncompliance with FMVSS 201 § 3.4.1.

Finally, the Court of Appeals *also* held that the district court committed a third, independent error by allowing Petitioner's expert witness Syson to opine that GM had reduced the amount of padding in its sun visors in order to save money. The Court of Appeals explained that "the whole point of *Daubert* is that experts can't 'speculate.' They need analytically sound bases for their opinions." *Id.* at 9a. Syson's testimony was therefore improper, because he "lacked any scientific basis for an opinion about the motives of GM's designers." *Id.* The Court of Appeals directed that "repetition [of this erroneous testimony] should not be permitted at a retrial." *Id.*

Following the panel's ruling, Petitioner sought rehearing and rehearing *en banc*. In support of his plea for rehearing, Petitioner advanced the same argument that he now makes in his Petition to this Court—namely, that the panel had "[f]ailed

to [f]ollow the [m]andate of Fed. R. Civ. P. 61" (the harmless error rule). *See* Plaintiff-Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc* in *DePaepe v. General Motors*, No. 96-3886 (7th Cir.) ("DePaepe CA7 Reh'g Pet.") at 1. Petitioner insisted that, contrary to the panel's express finding, "the errors found could not have affected [GM's] 'substantial rights.'" *Id.* Petitioner also complained that the panel's opinion "[f]ail[ed] to [a]cknowledge or [a]pply the [c]ontrolling [s]tandards of [r]eview and [e]rroneously [a]pplie[d] a *[d]e [n]ovo* standard to [r]eview" the district court's rulings, in violation of well-settled Seventh Circuit precedent. *Id.* at 6. In addition, Petitioner protested that the panel opinion—which was authored by Judge Easterbrook—"[l]ack[ed] [f]undamental [a]ttributes necessary to a [m]inimally [a]dequate [a]ppellate [d]ecision" because, *inter alia*, it did not "set forth the standard of review being utilized by the Court." *Id.* at 8-9. Apparently unpersuaded by Petitioner's claims of error, the Seventh Circuit denied rehearing and rehearing *en banc*. App. 22a.

REASONS FOR DENYING THE WRIT

As noted above, the Seventh Circuit reversed and remanded for a new trial based on its conclusion that the district court had committed *two* independent errors regarding the admissibility of evidence of GM's compliance with FMVSS 201 § 3.4.1. *First*, the district court had erred by denying GM's motion in limine concerning FMVSS 201 § 3.4.1 and allowing Petitioner to argue to the jury that GM had failed to comply with that standard. *Second*, the district court had committed an independent error by imposing "an enforced quietus on the subject" of FMVSS compliance after Petitioner had presented extensive evidence of GM's alleged noncompliance with the standard. The Seventh Circuit determined that these errors were not harmless, and therefore required reversal. In addition, the Court of Appeals concluded that the district court erred by

allowing Syson to speculate regarding GM's supposed motive for reducing the amount of padding in its sun visors.

In challenging the Seventh Circuit's decision, Petitioner focuses on the first of these findings of error. Thus, he argues that the Court of Appeals erred (and created a circuit split) in ruling that the district court "should have granted GM's motion in limine and prevented [Petitioner] from arguing to the jury that GM failed to comply with FMVSS 201 § 3.4.1," because that ruling was based on the Court of Appeals' conclusion (which Petitioner contends is erroneous) that FMVSS 201 § 3.4.1 imposes only a "design standard" as opposed to a "performance standard." As we explain in Section II, *infra*, Petitioner is mistaken: The Seventh Circuit's ruling that FMVSS 201 § 3.4.1 does not impose a "performance standard" is correct, and is entirely consistent with NHTSA's own interpretation of that regulation. In any event, that ruling plainly does not create a conflict among the circuits.

Even more fundamental, however, a ruling by this Court reversing the Seventh Circuit's interpretation of FMVSS 201 § 3.4.1, and concluding that the standard actually imposes a performance standard rather than a design standard, *would not alter the outcome of the decision below*. It would not erase the fact that, in the middle of trial and after Petitioner had argued noncompliance for several days, the district court "declar[ed] FMVSS 201 § 3.4.1 invalid and forb[ade] either side to mention it again in the jury's presence." App. 3a. And, as we have seen, the Court of Appeals declared the district court's imposition of this "enforced quietus" to be a second, independent error warranting reversal.[11]

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[11] Again, the enforced quietus constituted error because it denied GM the right "to inform a jury that its vehicles pass federal muster and to invite the jury to conclude that a vehicle that complies with all federal rules is safe enough to be on the road." App. 5a. And deprivation of that right, far from

(continued...)

Because the Seventh Circuit's reversal was based not only on its conclusion that the district court erred by denying GM's motion in limine and allowing Petitioner to argue noncompliance to the jury, but also on its conclusion that the enforced quietus imposed by the district court constituted error, Petitioner can obtain the reversal of the Seventh Circuit's ruling only if he establishes that the district court did not err by imposing an enforced quietus. And, of course, this Court will not normally grant a petition for writ of certiorari to review an alleged conflict where the resolution of the conflict would not change the result reached below. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.4(6) (7th ed. 1993) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)).

Here, the Court of Appeals' holding that GM was unfairly prejudiced by the district court's enforced quietus regarding compliance with FMVSS 201 § 3.4.1 is correct, and in any event involves nothing more than an entirely routine application of well-settled, and undisputed, principles of harmless error analysis. Moreover, the Court of Appeals *also* held that the district court committed yet another independent error, by allowing Petitioner's expert Syson to testify, without any basis in fact, that the reason why GM designed the visor the way it did was to save money—yet another error that was grossly prejudicial, uncured, and justifies a new trial. Neither of these other holdings by the Court of Appeals—which are necessary to decide this case—raises a certworthy question.

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[11] (...continued)
harmless, was especially damaging given that Petitioner had been allowed to argue noncompliance at length: "When the judge precluded all further reference to FMVSS 201 § 3.4.1, GM was behind the eight ball and never had an opportunity to present its side of the matter to the jury." *Id.*

I. The Court of Appeals' Ruling That the District Court's "Enforced Quietus" Ruling Was Not Harmless Is Not Worthy of This Court's Review, and In Any Event Was Correct.

Petitioner does not dispute that it was error for the district court to impose the enforced quietus upon GM. Instead, the only argument that Petitioner offers that could possibly constitute grounds for reversing the Court of Appeals' enforced quietus ruling is his argument that any errors that were committed by the district court *were harmless*. *See* Pet. at 22-28. The Court of Appeals, however, expressly determined that the district court's FMVSS errors (including the erroneous imposition of the enforced quietus) were *not* harmless. Petitioner's argument, therefore, reduces to a claim that the Seventh Circuit's harmless error ruling was incorrect. That claim is not only quintessentially uncertworthy—for it entails only case-specific error correction involving the application of settled law (the harmless error rules) to the facts of this case—but is wrong to boot.

A. Petitioner's challenge to the Seventh Circuit's harmless error ruling amounts to a plea for error correction.

Petitioner claims that the Seventh Circuit erred in concluding that the errors committed by the district court were not harmless and warranted a new trial. To support that contention, Petitioner maintains that "the court of appeals[] refus[ed] to recognize and apply the correct standard of review": "The three members of the panel treated this appeal as if they were trial judges" and "ignored the findings of the trial judge." Pet. at 27, 22. Had the court "applied the proper standard of review," Petitioner insists, "it could not have directed that a new trial take place." *Id.* at 24.

Merely stating this argument suffices to establish that it does not warrant an exercise of this Court's certiorari jurisdiction.

Petitioner does not contend that the Seventh Circuit systematically misapplies the proper standard of review in conducting harmless error review. Nor does he maintain that the Seventh Circuit's formulation of the standard of review for harmless error is in conflict with the standard of review employed by other circuits.[12] Instead, his claim is simply that, in this case, a panel of the Seventh Circuit applied the wrong standard of review and therefore erred in concluding that the error in question was not harmless. This is, of course, simply a claim that the panel misapplied settled law to the facts of this case. This Court does not normally grant certiorari to consider such case-specific claims of error correction, and Petitioner offers no reason why the Court should start doing so now.

B. There is no error to correct.

In addition to being uncertworthy, Petitioner's challenge to the Court of Appeals' harmless error ruling is insubstantial and without merit. Petitioner contends that the Seventh Circuit erred by applying a *de novo* standard of review in evaluating whether the errors committed by the district court were harmless, rather than the abuse-of-discretion standard that Petitioner claims is applicable. *See* Pet. at 14, 22, 24, 28.

The most basic problem with this contention is that Petitioner is unable to point to any evidence in the record to support his assertion that the Court of Appeals applied a *de novo* standard of review. In a moment of candor, Petitioner

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[12] Indeed, in seeking rehearing below, Petitioner cited and quoted from several Seventh Circuit opinions setting forth the standard of review for harmless error determinations—including one opinion by Judge Easterbrook, the author of the panel opinion in this case—in his unsuccessful attempt to convince the full court that the panel's harmless error ruling was erroneous and deserving of the full court's attention. *See* Plaintiff-Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc* in *DePaepe v. General Motors*, No. 96-3886 (7th Cir.) ("DePaepe CA7 Reh'g Pet.") at 1 (citing *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1260 (7th Cir. 1995)).

tacitly acknowledges the lack of any support for his assertion that the Court of Appeals applied a *de novo* standard —arguing that "[t]he court of appeals *apparently* believed itself free to ignore the district court's findings regarding lack of prejudice and to determine the question of whether a new trial should be granted on a *de novo* basis." Pet. at 24 (emphasis added). Thus, Petitioner's core contention—that the Court of Appeals applied the wrong standard of review—is supported by nothing other than his own speculation.

Indeed, Petitioner's current contention—that the Court of Appeals erroneously adopted a *de novo* standard of review—is at odds with his contention at the rehearing stage that the panel's decision did not state *what* standard of review it was applying. In his request for *en banc* rehearing, Petitioner complained that "[t]he [panel] [o]pinion [l]acks [f]undamental [a]ttributes necessary to a [m]inimally [a]dequate [a]ppellate [d]ecision" because it "failed to set forth the standard of review being utilized by the Court."[13] DePaepe CA7 Reh'g Pet. at 8-9. But absent any evidence to the contrary, it must be assumed that the Seventh Circuit is familiar with the standards that govern its appellate review, and that the Court of Appeals

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[13] The Petition for Rehearing went on to argue that "[w]hile plaintiff recognizes that there are varying styles of appellate opinion writing, the maxim that any opinion should at least set forth the governing standard of review is fundamental," and that "an accurate statement of the facts and relevant authorities is also critical to the basic integrity of a judicial opinion." DePaepe CA7 Reh'g Pet. at 9. In the view of Petitioner's appellate counsel (who was not the distinguished Mr. Morrison, who is counsel of record here), the panel opinion "omits or misstates . . . key facts and relevant legal authorities which were critical to a proper decision of this case[.]" *Id.* While we suspect that these attacks on the Court of Appeals' decision are not likely to have shattered Judge Easterbrook's confidence, they do highlight that, at bottom, Petitioner's claim that the Court of Appeals applied the wrong standard of review amounts to nothing more substantial than a complaint that the Court of Appeals did not explicitly recite the applicable standard of review.

applied the correct standard of review. At bottom, Petitioner's claim that the Seventh Circuit applied the wrong standard of review in conducting its harmless error analysis reduces to nothing more than a complaint that the panel did not explicitly recite the standard of review. But there is no basis to assume that the Court applied the *wrong* standard of review.

Moreover, the law governing whether the district court's mid-trial reversal was cured by the instruction it gave the jury was not in dispute on appeal. GM fully acknowledged (a) that the district court gave a curative instruction, and (b) that there is a presumption that a jury will follow an instruction to disregard inadmissible evidence. *See, e.g.*, GM CA7 Br. at 30-33; GM CA7 Reply Br. at 20-21. GM argued, however, that it was simply beyond the pale to believe that the instruction given by the district court in this case could cure the impact of what the jury had heard about FMVSS 201 § 3.4.1. *See supra* at 8. GM cited, in this regard, the Seventh Circuit's ruling in *Joseph v. Brierton*, 739 F.2d 1244, 1248 (7th Cir. 1984), which holds that "we must reverse [if the trial court gives] a curative instruction that we are convinced could not have cured." GM CA7 Br. at 31; *see also id.* (quoting *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977) ("cautionary instructions are effective only up to a certain point," which is passed "after repeated exposure of a jury to prejudicial information")); GM Reply Br. at 20-21. Petitioner invoked essentially the same rule (which he now describes in his Petition as a "well-accepted tenet of appellate review," Pet. at 24), citing the Seventh Circuit's decision in *Raybestos Products v. Younger*, 54 F.3d 1234, 1239 (7th Cir. 1995), for the proposition that an "appellate court must 'presume that the jury will follow an instruction to disregard inadmissible evidence *unless there is an overwhelming probability that the jury will be unable to follow the court's instructions and strong likelihood that the effect of evidence would be devastating* .'" DePaepe CA7 Br. at 18 (emphasis added).

None of the principles governing this harmless error analysis was, or is, in dispute. Rather, Petitioner simply disagrees with the Court of Appeals' application of these well-settled principles to the very odd and unique facts of this case.[14]

Finally, in any event, the Seventh Circuit's determination that the district court's errors (and specifically its enforced quietus ruling) were not harmless was amply supported in the record. Perhaps most significant, in this regard, were the repeated concessions at trial by Petitioner's own counsel, who agreed that it would be "impossible to erase what this jury has heard on this subject [of FMVSS compliance] from their minds," and that "to try and separate out this feature of the case from the jury's minds at this juncture would not be effective or possible." CA7 App. 341-42, 347; *supra* at 6. With such evidence in the record, it is hardly surprising that the Court of Appeals determined that the enforced quietus (like the district court's erroneous denial of the motion in limine) was not harmless.

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[14] Persisting in his stylistic critique of the Seventh Circuit's opinion, Petitioner also complains that "[t]he opinion *does not even mention the fact that this appeal was taken subsequent to the trial court's denial of [GM's] motion for new trial.*" Pet. at 23 (emphasis in original). He also cites cases from this Court and the courts of appeals for the proposition that a district court's ruling on a motion for new trial is reviewed for abuse of discretion. *Id.* at 23 and n.15. As previously noted, GM did not assert the district court's ruling on the new trial motion as a separate and independent assignment of error; instead, it challenged the district court's various rulings in the context they were rendered, such as the district court's denial of GM's motion in limine with respect to FMVSS 201 § 3.4.1. In any event, the Seventh Circuit, of course, applies the same standard of review, *see, e.g., Mayall v. Peabody Coal Co.*, 7 F.3d 570, 572 (7th Cir. 1993), and any suggestion that the panel was unaware of that standard is unfounded and specious.

II. The Seventh Circuit Properly Interpreted FMVSS 201 § 3.4.1 As Not Imposing a Performance Standard.

For the reasons set forth above, the Court of Appeals' ruling that the district court committed harmful error by imposing the enforced quietus is a factbound, case-specific ruling not worthy of this Court's review. In addition, Petitioner's suggestion that the Court of Appeals applied the wrong standard in rendering that ruling is unsupported and without merit. Accordingly, this Court need not even reach Petitioner's challenge to the Court of Appeals' interpretation of FMVSS 201 § 3.4.1: As noted previously, even were this Court to reverse that ruling, it would not change the outcome of the case, as long as the Court of Appeals' enforced quietus ruling stands. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.4(6) (7th ed. 1993).

In any event, Petitioner's challenge to the Seventh Circuit's FMVSS ruling is also unavailing. Petitioner contends that this ruling created a circuit split, and that it was erroneous. Both claims are wrong.

A. The Seventh Circuit's decision does not create a conflict regarding the construction of motor vehicle safety standards.

Petitioner claims that the Seventh Circuit's interpretation of FMVSS 201 § 3.4.1 as a "design standard" rather than a "performance standard" has created a conflict among the federal appellate courts. The claimed conflict is, in fact, nonexistent.

Petitioner claims that the Seventh Circuit's ruling creates a conflict because (he maintains) three other courts of appeals have "uniformly held" that the Department of Transportation "is 'generally charged with developing performance standards, not design specifications.'" Pet. at 18. Of course, the mere assertion that NHTSA is "generally charged" with issuing

performance standards does not conflict with the Seventh Circuit's recognition that some of the standards issued by NHTSA can be characterized as "design" standards. And, indeed, the cases Petitioner cites expressly recognize that safety standards can have "design" elements as well as "performance" elements. For example, the First Circuit explained in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988) that:

> [A]lthough design and performance standards are analytically distinct, in practice the line is not so clear. For example, a performance standard requiring that a vehicle's driver should be able to see in the dark is not very different from a design standard requiring that a vehicle have lights. Similarly, although FMVSS 208 is a performance standard dealing with the protection of occupants from the second collision, it specifies that vehicles must either have seat belts meeting certain criteria or have other safety equipment (passive restraints) that will protect occupants from the second collision. *By requiring seat belts or passive restraints, FMVSS 208 has elements of a design standard.*

Id. at 416-17 (emphasis added). Significantly, the First Circuit made this statement in the context of *rejecting* a plaintiff's argument (against pre-emption) that was in turn founded on the assertion that "under the Safety Act, NHTSA may only promulgate performance standards." *Id.* at 416.

Similarly, the Tenth Circuit in *Washington v. Dept. of Transp.*, 84 F.3d 1222 (10th Cir. 1996), acknowledged that "the performance-design distinction is much easier to state in the abstract than to apply definitively . . . in concrete situations," and that "NHTSA's regulatory authority extends beyond the performance of motor vehicles *per se*, to particular items of equipment." *Id.* at 1224-25. *See also id.* at 1225 ("NHTSA has frequently drawn on this authority to promulgate standards, particularly those dealing with safety devices, that

take the bipartite form reflected in the ABS standard of [49 C.F.R.] § 571.121: 'first, motor vehicles are required to have specific items of equipment; and, second, these enumerated items of equipment are subject to specific performance standards.'"). These statements by the Tenth Circuit are entirely consistent with the Seventh Circuit's statement, which was that:

> Motor vehicle safety standards come in two flavors: design and performance. Design standards specify what a component of a vehicle must be; performance standards specify what the component must accomplish. A requirement that every car have safety belts is a design standard, a requirement that each anchorage of each safety belt withstand a 5,000 pound force (see FMVSS 210 § 4.2.1) is a performance standard.

App. 3a.

As for the Sixth Circuit, finally, that court has expressly recognized that the MVSA "defines 'safety' at least in part in terms of design," and indeed (in one of the authorities relied on by Petitioner) rejected a challenge to a safety standard that it described as "in a sense a design restriction." *Chrysler Corp. v. Dept. of Transp.*, 515 F.2d 1053, 1057-58 (6th Cir. 1975). Notably, in approving that standard, the Sixth Circuit explained that the reason most standards are stated in "performance" terms rather than "design" terms is because Congress "decided that the need for safety could best be met by encouraging competition among manufacturers in devising methods to achieve objective performance goals," and "wished to avoid the tedious stylistic uniformity that would result if the NHTSA undertook to control vehicle design on a broad scale." *Id.* at 1058. The Sixth Circuit found that neither of these Congressional goals was frustrated by NHTSA's issuance of the standard requiring rectangular headlights to be of a certain size (even though the Sixth Circuit viewed that standard as "in a sense a design restriction"). The court explained that: "[W]e

do not believe that standardization of headlamps is seriously inconsistent with the congressional desire not to stifle innovations in automotive styling. Headlamps are a relatively small component in overall vehicle design, and they have been standardized for many years without depriving motorists of a wide variety of automobile designs." *Id.* at 1058-59. The same could be said of sun visors: imposition of a requirement that cars have padded sun visors does not seriously "stifle innovations in automotive styling" or "depriv[e] motorists of a wide variety of automobile designs."

At the end of the day, therefore, Petitioner's claim of conflict reduces to the assertion that "no court, prior to the instant decision, has ever declared that the [Department of Transportation ("DOT")] has authority to issue design standards *even if they contain no safety performance requirements*." Pet. at 18 (emphasis added). This last-ditch argument fails for two reasons. *First*, whether accurate or not, it is beside the point: even if no court has so held, that would signify merely that no court has been called on to decide squarely the question whether DOT may issue "design standards" that do not contain specific performance requirements. In order for a conflict to exist, Petitioner would have to identify decisions from other courts of appeals holding that DOT *does not* have the power to issue such design standards—and the cases cited by Petitioner do not meet that description. *Second*, even there were any truth to Petitioner's claim that design standards must, as a rule, be coupled with performance requirements, that rule is satisfied here: Standard 201 is a "bipartite" standard, which both requires that automobiles have padded sun visors, *see* § 3.4.1, and sets performance standards for the mounting of those sun visors, *see* § 3.4.2.[15]

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[15] Subsection 3.4.2 (which is now referred to as § 5.4.2, *see supra* at n.4) (continued...)

In short, the conflict Petitioner claims to have identified is wholly illusory.

B. The Seventh Circuit's interpretation of FMVSS 201 § 3.4.1 is correct and consistent with the promulgating agency's interpretation.

As the foregoing discussion illustrates, the Seventh Circuit's holding that FMVSS 201 § 3.4.1 is not a performance standard is not the vast and radical departure from the settled construction of federal motor vehicle safety standards that Petitioner would have this Court believe. Indeed, as the Court of Appeals noted, NHTSA—the agency that promulgated and enforces the standard—has stated unequivocally *on at least three occasions* that FMVSS 201 § 3.4.1 "is not a performance standard." See 60 Fed. Reg. 60,404 (1995); 61 Fed. Reg. 23,413 (1996); 61 Fed. Reg. 62,934 (1996). These statements by NHTSA are decisive on the issue. As this Court has recognized, a federal agency's interpretation of its own regulations "must be given '"controlling weight unless it is plainly erroneous or inconsistent with the regulation."'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). Moreover, the plain terms of FMVSS 201 § 3.4.1 do not identify a specific performance objective.

Petitioner's attempts to cast doubt on the Seventh Circuit's conclusion that FMVSS 201 § 3.4.1 does not amount to a performance standard are futile.

First, Petitioner suggests that NHTSA's repeated statements that FMVSS 201 § 3.4.1 "is not a performance standard" may

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[15] (...continued)
provides that "[e]ach sun visor mounting shall present no rigid material edge radius of less than 3.2 mm that is statically contactable by a spherical 165 mm diameter head form." *See* 49 C.F.R. § 571.201 § 5.4.2. Earlier versions stated the relevant measurements in inches.

be disregarded because those statements "are not final rules issued after notice and comment." Pet. at 17. Agencies' interpretations of their own regulations, however, are not found only in "final rules issued after notice and comment." *See, e.g., Lyng v. Payne*, 476 U.S. 926, 939 and 932 n.3 (1986) (unpublished sample press release). Petitioner does not (and cannot) dispute that the three statements in question are official statements by NHTSA. They were made when NHTSA was considering whether to rescind FMVSS 201 § 3.4.1; in proposing the change, and seeking comment thereon, NHTSA explained that FMVSS 201 § 3.4.1 "is not a performance standard." 60 Fed. Reg. 60,404 (1995). NHTSA subsequently reiterated this description of FMVSS 201 § 3.4.1 in a regulatory evaluation of the proposed change, *see* 61 Fed. Reg. 23,413 (1996), and again in its decision stating that it would leave FMVSS 201 § 3.4.1 in place, *see* 61 Fed. Reg. 62,934 (1996). The Seventh Circuit properly looked to these repeated, official statements by the promulgating agency in concluding that FMVSS 201 § 3.4.1 does not impose a performance standard.

Second, Petitioner contends that other statements by NHTSA (specifically, statements made in 1982 and 1988) contradict NHTSA's later repeated statements that FMVSS 201 § 3.4.1 is not a performance standard. Pet. at 17-18. This argument is misleading and incorrect. The sleight-of-hand that Petitioner is attempting is to have the Court overlook the fact that in the 1982 and 1988 pronouncements, NHTSA was speaking of FMVSS standard 201 *generally*, whereas in the statements described above (and relied on by the Seventh Circuit), NHTSA was speaking specifically of *subsection 3.4.1* of FMVSS standard 201—that is, the provision that actually is at issue in this case. This distinction is critical, because the 1982 and 1988 statements highlighted by Petitioner state only that *standard 201* (of which § 3.4.1 is but one subsection) sets

performance requirements for sun visors[16]—not that *subsection 3.4.1* of standard 201 does so. And, indeed, there *is* a subsection of FMVSS 201 that sets a performance standard for sun visors, but it is not subsection 3.4.1. It is, rather, subsection 3.4.2—which sets a performance standard for the *mounting* of sun visors (and which is not at issue in this case). *See supra* at n.15. In short, the 1982 and 1988 statements that Petitioner highlights do not contradict NHTSA's other statements (upon which the Court of Appeals relied), and provide no support for Petitioner's claim that *subsection 3.4.1* of FMVSS 201 imposes a "performance standard."

Third, Petitioner argues that the NHTSA statements cited by the Court of Appeals are inconsistent with the definition of "motor vehicle safety standard" in the Motor Vehicle Safety Act ("MVSA"). Petitioner, however, is a selective reader. As explained in the very cases that Petitioner cites in attempting to concoct a circuit split, *see supra* at II.A, the MVSA "defines 'safety' at least in part in terms of design." *Chrysler Corp. v. Dept. of Transp.*, 515 F.2d 1053, 1057 (6th Cir. 1975). *See also Washington v. Dept. of Transp.*, 84 F.3d 1222, 1225 (10th Cir. 1996) ("NHTSA's regulatory authority extends beyond the performance of motor vehicles *per se*, to particular items of equipment"). Consequently, NHTSA's repeated statements that FMVSS 201 § 3.4.1 "is not a performance standard" are unremarkable, and not at odds with the MVSA.

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[16] The 1982 statement highlighted by Petitioner states that "*Standard No. 201* sets performance requirements for instrument panels, interior compartment doors, sun visors and arm rests to prevent or reduce injuries to persons thrown against them in crashes." 47 Fed. Reg. 25,170 (1982) (emphasis added). The 1988 statement, similarly, provides only that "*Standard No. 201* . . . regulates the performance of certain vehicle interior surfaces in a crash, specifying impact tests or requiring padding for instrument panels, seat backs, sun visors, armrests and glove compartment doors." 53 Fed. Reg. 2,516 (1988) (emphasis added).

Finally, contrary to Petitioner's suggestion, the Seventh Circuit's interpretation does not render FMVSS 201 § 3.4.1 a nullity. The standard still contains important safety considerations: Each vehicle must still provide sun visors, which serve a vital purpose in preventing accidents caused by momentary sun blindness, and the visors must be constructed of or covered by an energy-absorbing material, and therefore cannot be made of sharp, dangerous materials. As NHTSA noted in refusing to repeal § 3.4.1, it "is too substantive to rescind." 61 Fed. Reg. 62,934 (1996).

In short, the Seventh Circuit's interpretation of FMVSS 201 § 3.4.1 creates no conflict, and is correct.

III. The Seventh Circuit's Holding That the District Court Erred By Allowing Syson to Speculate Constitutes An Alternative Ground for the Decision Below, And Is Not Challenged by Petitioner.

Finally, Petitioner does not challenge the Seventh Circuit's third, independent finding of error—its holding that "the district judge erred by allowing Syson to testify" because "Syson lacked any scientific basis for an opinion about the motives of GM's designers." App. 9a. Accordingly, even were this Court to find the two other Seventh Circuit rulings in this case (a) worthy of this Court's certiorari review, and (b) erroneous, the Seventh Circuit's third finding of error by the district court would remain undisturbed, and the outcome of the decision (reversal of the district court's judgment) would not change.

In an apparent attempt to downplay the Seventh Circuit's holding on this issue, Petitioner describes the district court's erroneous admission of Syson's testimony as a "limited error." Pet. at 13-14 n.6. He offers no explanation, however, for that characterization, and certainly can draw none from the Seventh Circuit's opinion. Petitioner also notes that the Seventh Circuit

"did not cite" the Syson error "as part of its basis for granting a new trial." *Id.* That is irrelevant, however: The Court of Appeals had already ordered a new trial before addressing the Syson error. Moreover, the Court of Appeals clearly stated that repetition of the error of allowing Syson's speculation about cost savings "should not be permitted at a retrial." App. 9a. There would have been no reason to issue that admonition if, as Petitioner is apparently suggesting, the Court of Appeals did not believe that error to be significant.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL T. CAPPUCCIO
Counsel of Record
THEODORE W. ULLYOT
ADAM G. CIONGOLI
KIRKLAND & ELLIS
655 Fifteenth Street
Washington, D.C. 20005
(202) 879-5000

Counsel for Respondent General Motors Corporation

November 9, 1998

(3)

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No. 98-390

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL K. DePAEPE, executor of the estate of Kenneth J. DePaepe,

Petitioners

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER IN SUPPORT OF CERTIORARI

ALAN B. MORRISON
(COUNSEL OF RECORD)
PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, NW
WASHINGTON, DC 20009
(202) 588-1000

RICHARD M. GOODMAN
GREGORY S. PIERCE
GOODMAN, LISTER & PETERS, P.C.
1394 EAST JEFFERSON
DETROIT, MI 48207
(313) 567-6165

ANGELA J. NICITA
GRANZOTTO & NICITA, P.C.
1500 BUHL BUILDING
DETROIT, MI 48226
(313) 964-4720

Attorneys for Petitioner

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REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI[1]

1. Respondent's lengthy defense of the Seventh Circuit's much shorter opinion is designed to obscure the central ruling below and thereby persuade the Court that this is not a certworthy case. Beginning with its reversal of the order of the questions presented, and hence the reasons for granting (or denying the petition), respondent seeks to recast the case from one raising an issue going to the heart of how the Department of Transportation ("DOT"), through the National Highway Traffic Safety Administration ("NHTSA"), regulates automobile safety, to one in which the issue is no more than whether the court of appeals misapplied the standard for determining harmless error.

Despite respondent's efforts, the central issue presented by the petition remains whether the court of appeals was correct in its ruling that DOT has the authority to issue pure design standards, containing no enforceable performance elements, and that the sun visor standard is such a standard. Even when respondent does turn to that general topic, it never attempts to defend what the court of appeals actually held. Nor can it reconcile the principles underlying the decision below with other appellate decisions, the views of DOT, or the long-standing position of the automobile industry on the authority of DOT to issue a pure design standard. Indeed, beginning with the question presented -- which respondent revised as whether the

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[1] As used in this reply, "Pet. App." means the appendix to the petition in this Court; "Opp." means respondent's brief in opposition; and "App" and "Supp. App" mean, respectively, the appendix and the supplemental appendix in the court of appeals.

court of appeals properly held that the sun visor standard "does not impose a specific performance standard," rather than whether it was a valid design standard -- through the statement of the case and reasons for denying review, respondent is unremitting in its efforts to shift the focus away from the Seventh Circuit's unprecedented ruling.

As part of this effort, respondent claims that the decision to order a new trial was independently based on the "enforced quietus" that the district court imposed on respondent after petitioner had allegedly been allowed to present evidence and to argue to the jury that respondent had violated the sun visor standard (Opp. at 1). We show below that the factual predicate of that allegation is without basis for both petitioner and respondent, but it is equally unavailing as a matter of law. Thus, respondent can only have suffered a legitimate injury from any "enforced quietus" if it had the right to argue to the jury that it had complied with the sun visor standard as a matter of law, since it could always have argued (but chose not to argue) that the protection provided was reasonable. But that compliance argument is a permissible one *only* if the standard is a valid design standard, even though it lacks any performance requirements, which is the principal question presented by the petition. Far from being an independent ground for sustaining the decision below, the "enforced quietus" argument only reinforces petitioner's point that the issue of whether DOT has the power to issue design standards that lack any performance aspects is the central and outcome-determinative issue in this case.

2. Respondent attempts to avoid review by citing cases that state that there may be design elements in standards properly issued by DOT. We agree, and in some cases, the design aspects of a standard (such as the size of the sun visor

here) are inevitable and integral parts of any sensible regulation. But this is not what the court of appeals meant when it said that standards "come in two flavors: design and performance" (Pet. App. 3a), or when it held that the sun visor rule was a design standard and that respondent had satisfied it by having a sun visor with the required design elements, even if its visor provided no protection to vehicle occupants in a crash. *Id.* at 5a. It was only because the court of appeals concluded that the sun visor standard was a pure design standard and that it was invalid as a performance standard that it found reversible error. But even that error was arguably significant only because the district court had refused to allow respondent to argue that it had complied with the standard as a matter of federal law. Indeed, if the court of appeals had found that this standard was a mixed design and performance standard, there would have been no prejudicial error on an "enforced quietus" theory since both sides would have been silenced, making any error harmless.[2]

Contrary to respondent's opposition, the decisions of other courts of appeals are wholly inconsistent with the ruling here. To be sure, no case involves sun visors or any product liability claims, nor has DOT ever tried to issue a pure design standard. But one cannot read the opinions cited in the petition and not recognize a fundamental difference in what those courts

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[2] Respondent, but not the court of appeals, argues (p. 24 and n. 15) that the mounting features of the sun visor are stated in performance terms and that somehow that satisfies the performance requirement of the statute. If that were the case, the slightest performance tail could wag the largest design dog, thereby undermining the basic judgment by Congress, explained in the petition (at 15-16) that DOT's standards for automobile safety must be stated in terms of performance and not design.

conclude automotive safety standards must contain, compared to how the court of appeals here viewed what DOT may do. We further note the conspicuous absence of any attempt by respondent to refute our claim that the *industry* itself has always taken the position that DOT has no authority to issue design standards. Nor does respondent disagree that, when the industry has challenged DOT standards in court, one of the grounds has been that DOT strayed too far from the performance requirement under the statute. Petition at 19-20.

Moreover, as we pointed out in the petition (at 17), the citations to the Federal Register on which the court of appeals relied were no more than descriptions of existing standards in an agenda of possible agency activities. They were not issued as part of a final rule, or even a notice of proposed rulemaking, and hence can have no binding or even persuasive effect, especially given the numerous other authorities (including those from DOT itself) that make clear that DOT's position is directly at odds with that of the court of appeals below. But if there is any doubt on this issue, the Court could ask for the views of the United States.

3. Although we believe that the "enforced quietus" point is flawed because it is premised on a mistaken view of whether the sun visor standard is valid as a design standard, it is also inapplicable here because it overlooks what actually took place in the trial court. As the petition shows (at 25), respondent chose to defend this action principally on the ground that the concrete-hard sun visor was not the cause of the injuries to petitioner's decedent. Thus, an instruction to the jury that the sun visor complied with federal standards would have been of no help to respondent since that was not the focus of its defense. In any event, respondent's motion for a mistrial in the district court did not allege that the court's reversal on the effect of the

standard had deprived it of the opportunity to show compliance, and hence that argument was waived. *Diersen v. Chicago Car Exchange*, 110 F.3d 481, 485 (7th Cir. 1997). At the very least, the failure to seek a new trial on this ground undermines any claim that the inability to present such a defense was other than harmless error.

Even more fundamentally, a claim of enforced silence does not relieve the allegedly silenced party from making an offer of proof under FRE 103(a)(2) as to what evidence it would have offered if it had been allowed to do so. *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 887, 888 (9th Cir. 1991). Nor can that failure be overlooked here on the theory that it is plain from the record what evidence respondent would have offered, even without a formal offer of proof. To the contrary, given respondent's focus on causation, and the absence of *any* effort to show that the visor was reasonably energy-absorbing, the failure to make a proffer on this issue was not the result of any enforced silence, but rather part of respondent's basic strategy.

Moreover, there is no substance to the charge that petitioner extensively argued to the jury that respondent failed to comply with the sun visor standard before the trial judge reversed his ruling on the relevance of the standard. To begin with, although the court of appeals made the charge (Pet. App. 5a), it did not provide a record citation -- because there is none. Of course, much of the evidence presented by petitioner bore on the issue of whether the protection afforded by respondent's sun visor was "reasonable" as petitioner contends that the DOT standard requires. But even respondent does not contend that such evidence should have been excluded since, as it conceded in the district court (Supp. App. 67), it was relevant to other issues, including petitioner's claim that the protection was

inadequate as a matter of Illinois law, without regard to any federal standard.

Contrary to the impression given by the court of appeals and respondent, none of petitioner's witnesses testified that respondent's standard violated federal requirements. On the other hand, there was direct testimony from respondent's own former engineer, Susan Gatchell, that she had certified the visor's compliance with §3.4.1 and that it was her opinion that it did comply (Supp. App 1-11). Thus, if anyone had the right to claim prejudice from the district court's reversal of position and an "enforced quietus," it is petitioner, not respondent, but there is surely no basis for the court of appeals to have held that this reversal caused anything more than harmless error to respondent.[3]

4. In its final effort to avoid review, respondent claims that allowing petitioner's expert to give his opinion that

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[3] Contrary to the suggestion made at least twice in the opposition (at 6, 20), the state of the record when the reversal occurred also explains the initial reaction of petitioner's counsel that his client could not get a fair trial. At that point, respondent's witness had testified that the standard had been met, but petitioner's engineering witness would be denied the opportunity to respond (App. 342; Supp. App. 61-62). Respondent's counsel understandably agreed with the ruling and proposed a curative instruction (Supp. App. 65); it was not until the next day that respondent moved for a mistrial (App. 348). Thus, taken as a whole, these events show that, whatever prejudice might have resulted from the trial court's reversal of its position regarding the sun visor standard, it was surely not sufficiently harmful to respondent to warrant a new trial.

General Motors removed padding from the visor in order to save money was, by itself, sufficient prejudicial error to require a new trial. Respondent contends that the court of appeals would have ordered a new trial on this ground alone, but there is no basis for such blatant speculation. *See* Pet. App. 9a.

More significantly, any argument that this error alone would require yet a third trial is plainly without merit. As the court of appeals recognized (id.), the jury surely could have drawn the inference that respondent's decision to remove energy-absorbing padding was motivated by a desire to save money, even without any direct testimony on that point. Indeed, given the state of the record, it is hard to imagine any other inference that might have been drawn. There is, of course, nothing wrong with saving money -- unless it unreasonably puts lives at risk, which is the ultimate question for the jury in this case. Assuming that the court of appeals is correct in its evidentiary ruling, it is virtually inconceivable that it would have ordered a third trial *solely* because a witness for the plaintiff was, at one point in a six week trial, allowed to speculate that the defendant had removed additional protection in sun visors to save money. As the petition explains (at 22-27), the court of appeals' disregard of well-established law in granting a new trial based on its de novo review of the record below, instead of deferring to the district court's finding of harmless error, is an independent basis for granting the petition. But despite that error, there is no basis to conclude that the appeals court would have gone so far as to require a new trial based on a single common-sense, albeit inadmissible, opinion offered by one witness. To find prejudicial error and overturn a jury verdict because that statement was allowed in evidence would be the functional equivalent of repealing the harmless error rule.

5. This petition directly presents a vitally important question regarding whether DOT may use design standards, that contain no enforceable performance requirements, to regulate automobile safety. The court of appeals ruling that DOT may use pure design standards -- and that it did so for sun visors -- conflicts with every other court, agency, and industry group that has considered the issue, thereby threatening to cause serious turmoil in the field of automotive safety regulation. Moreover, this erroneous ruling will, if uncorrected, necessitate a third trial in this case because there is no basis for a new trial unless the court of appeals is correct on the central issue of federal law.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Richard M. Goodman
Gregory S. Pierce
Goodman, Lister & Peters, P.C.
1394 East Jefferson
Detroit, MI 48207
(313) 567-6165

Angela J. Nicita
Granzotto & Nicita, P.C.
1500 Buhl Building
Detroit, MI 48226
(313) 964-4720

Attorneys for Petitioner

November 19, 1998